No. 9133

In the United States Circuit Court of Appeals

For the Ninth Circuit.

7

JAMES H. JORDAN, J. R. MASON, L. F. ABADIE, GEORGE F. COVELL, and FIRST NATIONAL BANK OF TUSTIN (a corporation),

Appellants,

vs.

PALO VERDE IRRIGATION DISTRICT, an Irrigation District,

Appellee.

APPELLEE'S BRIEF.

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Appellants,

vs.

PALO VERDE IRRIGATION DISTRICT, an Irrigation District,

Appellee.

APPELLEE'S BRIEF.

This brief is submitted by appellee in response to appellants' opening brief. Appellants correctly state (Op. Br. p. 2) that at the trial of the cause in the court below they made three objections to the relief herein sought by petitioner district. This court will note that appellants' opening brief herein contains the argument of fourteen propositions, eleven of which were not presented to the trial court.

Appellants' statement of facts (Op. Br. pp. 3 to 8) is, in the main, factually accurate. Appellee considers, however, that it is its duty to furnish the court with a more ample statement of facts, bearing largely upon the economic condition of appellee, which has caused the filing of this proceeding for relief by composition of its debts,

and giving particular consideration to the historical and physical background for such economic condition and the efforts made by appellee to rehabilitate itself. It is considered that this court should know fully the condition of distress which it is asked to relieve, in order that it can measure such condition by the standards of the statute (Title 11, U. S. C., Secs. 401 to 404; Secs. 81 to 84, Bankruptcy Act of 1898).

Statement of Facts.

Palo Verde Irrigation District comprises practically all of the Palo Verde Valley. This valley is a more or less lens-shaped strip of land lying along the west bank of the Colorado River, in the extreme easterly end of Riverside County, California, and is about thirty-five miles long, with a maximum width of about seven miles. It is an alluvial river-bottom, lying between the river on the east and a high mesa on the west. By deposition of silt in its bed, the river has gradually built the bed up so that it lies on a plane above the valley. The valley slopes to the west from the river and to the south along it. [History and physical data herein are largely drawn from the testimony of E. F. Williams, Tr. pp. 184, 194, and C. P. Mahoney, Tr. p. 198.]

The climate of the valley is hot and arid. The term "hot" is illustrated by the cautious statement of one witness that "Summer temperatures very seldom go above 122 degrees". [Tr. p. 188.] The term "arid" means that the average annual rainfall is between two and three inches and sometimes there is practically no rainfall for a year or two.

About 1877 one Thomas H. Blythe, of San Francisco, acquired about 40,000 acres in the valley lying along the river front and made the first water appropriations on the Colorado River in California. He initiated the beginnings of an irrigation system and did some farming. He died in 1883. The litigation over his estate is evidenced by dozens of decisions of the State and Federal Courts. It came to an end about 1904. At that time Palo Verde Land and Water Company acquired the Blythe Ranch. In 1908 it organized Palo Verde Mutual Water Company, which proceeded to lay out and operate an irrigation system throughout the valley and a rudimentary levee system along the river. The Mutual Water Company made a bond issue.

The gradual rising bed of the river led to floods in the valley and it was realized that extensive levee construction was necessary to save the valley. [Tr. p. 185.] Palo Verde Joint Levee District of Riverside and Imperial Counties, California, was organized in 1915 for this purpose and made two bond issues. Notwithstanding construction of the new levees, the riverbed continued to rise and floods continued to devastate the valley. In 1922 occurred the most disastrous flood, in which two-thirds of the valley was inundated, with damage exceeding one million dollars and with much of the land under water for several months.

By 1921 the pressure of the waterplane of the rising river led to the rising of the underground watertable in the valley, with the result that construction of drainage works was necessitated in order that farming might continue. Palo Verde Drainage District was organized in 1921 and issued bonds for the construction of drainage ditches. [Tr. p. 185.]

In 1923, for the major purpose of coordinating the work of the three previously existing organizations and reducing overhead expense, the State Legislature, by a special act (Palo Verde Irrigation District Act, Stat. Cal. 1923, p. 1067) authorized the merger of the Levee District and Drainage District into the present Palo Verde Irrigation District and the acquisition by the latter of the irrigation system of the Mutual Water Company. Such merger and acquisition were consummated. The Irrigation District, in order to extend and complete the levee and irrigation systems, issued bonds in 1925.

The boundaries of the Levee District and Drainage District were practically coterminous, although there were a few small areas that were in one and not in the other. The boundaries of the new Irrigation District, however, included all lands of each of the old districts.

In 1904 there were very few people in the Palo Verde Valley. The land was covered with a jungle growth. [Tr. p. 185.] A considerable influx of settlers took place, principally between 1916 and 1920. [Tr. p. 308.] During the years of the World War, and for a year or two thereafter, farming in the valley was reasonably profitable, but, owing to the increase in the load of debt upon the farmers, it was carried on at constantly increasing costs.

After the great flood of 1922 a great many of the people who had been flooded out did not come back to their farms. [Tr. p. 308.] The era of diminishing returns for agricultural products set in. Gradually farmers, who had sunk all they had in their farms and who could no longer finance their taxes and the cost of farming, began to drift out of the valley. After 1926 this process went on rather rapidly. [Tr. pp. 308, 312.]

In 1926 the acreage in cultivation reached its peak, 36,135 acres (subject to reduction on account of double-cropping some lands). The decline of the acreage in production proceeded steadily and in 1933 the gross acreage in cultivation was 21,117 or 58% of the maximum. [Ex. 24, Tr. p. 257.] The district's tax rates steadily pyramided. In 1928 and 1929 they were around $17.00 per $100.00 assessed valuation ($100.00 per acre being the maximum assessed valuation). [Tr. p. 258.] During this period of excessive tax rates the farmers paid out for taxes, costs of farming and living expenses, more than they took in from the sale of their crops. Those who could, borrowed money on the security of their land or any other credit they had and paid until their credit was exhausted. [Tr. p. 312.] At the same time, from 1927 to 1932, the percentage of land delinquent for district taxes mounted as follows:

1927,	26.37	per cent
1928,	31.49	" "
1929,	55.76	" "
1930,	97.38	" "
1931,	99.28	" "
1932,	99.21	" " [Ex. 25, Tr. p. 258.]

This tabulation evidences the galloping disease of insolvency of the district and shows how inevitably, as soon as more than half the land was delinquent, a complete collapse in the tax-collecting function must occur. Practically no redemptions took place. [Ex. 26, Tr. p. 260.]

The district, beginning May 1st, 1930, was obliged to default in payment of all bonds which it had issued and assumed. The situation, as to whether the district could

continue operating its irrigation system, was desperate. By various expedients, including the levy of water tolls upon the residue of the farmers who still remained on the land and the reduction by half of the former costs of operation, the operation of the system was carried on during the years after the default. [Tr. p. 252.] Under these circumstances a few of the bondholders, of whom the five appellants in this case are the intransigent residue, commenced harassing the district with suits on their bonds. Incidentally, not one of these suits has to this date gone to final judgment.

The farmers and the district, very shortly after the collapse occurred in 1930, commenced to cast about to ascertain their real condition and their real ability to pay and to find a way out of their plight. The following steps were taken:

1. The district appointed a committee to try to get federal aid. This committee met with Dr. Elwood Mead, Commissioner of the Bureau of Reclamation, and other officials of the bureau. Upon their suggestion, the district was taken into a relief survey of seventeen irrigation projects being made by the federal government. Hearings were held before the House Committee on Irrigation and Reclamation of the Seventy-first Congress, but the bill proposed to relieve the seventeen projects was not passed. [Tr. pp. 194, 195.]

2. Thereafter the committee advised with Congressman Phil D. Swing, who recommended attempting a separate bill for relief of the district. To prepare for such an effort, a fact-finding committee of six or seven persons in the valley made a careful investigation of the financial condition of the valley and the earning capacity of the lands

in the district and sought to find farming methods by which production in the valley could be improved by building up the fertility of the soil. The University of California, at the request of the district, send Professor R. L. Adams, who made an economic investigation and report. [Tr. p. 195.]

3. The district, early after the default, sought to come into discussion with its bondholders as a group and, for that purpose, suggested the formation of a bondholders committee. This committee sent an engineer, who made a survey of the valley. [Tr. p. 195.]

4. A committee of four went to Sacramento and met with the Director of Public Works and State Engineer, who made a report regarding the valley to the Secretary of the Interior. Congressman Swing introduced a bill calling for a grant of a million dollars to be paid to the bondholders, on condition that the latter consent to a reduction of the indebtedness to a sum found by the Secretary of the Interior to be not in excess of the district's ability to pay. Witnesses appeared for the district before the House Committee on Irrigation and Reclamation in support of the bill. The Secretary of the Interior and Commissioner of Reclamation recommended the passage of the bill. The committee made a report approving the bill but it was not passed. [Tr. pp. 194, 195.]

5. The district, after the failure of this bill, continued negotiations with the bondholders' committee toward an adjustment of the debt. On August 18th, 1932, a novel arrangement was agreed upon, by which the district leased all its tax-deeded land to the bondholders, with an option to acquire the same within five years, in exchange for cancellation of all the bonds. The bondholders, on their

side, were required to sublease the land back to the former owners thereof upon moderate terms and to re-sell to the former owners upon a basis which contemplated that, over a period of twenty years or more, as the lands might be re-sold, the bondholders might have recovered approximately forty per cent of the face value of their bonds, disregarding interest. [Tr. pp. 198, 199.]

6. In May, 1933, the Congress enacted Section 36 of the Emergency Farm Mortgage Act, authorizing Reconstruction Finance Corporation (hereinafter called "R. F. C.") to make loans for the refinancing of drainage, levee and irrigation districts. The sum of $50,000,000, later increased to $125,000,000, was appropriated for that purpose. In July, 1933, the district filed with R. F. C. its application for such a loan. The loan was rejected but later reconsidered and on March 1st, 1934, R. F. C. adopted resolution authorizing a loan to the district in the amount of $1,039,423.00, upon certain exacting and voluminous conditions. [Tr. pp. 201 to 223.] The principal amount of the district's debt at the time was $4,178,330.36. The resolution contemplated refinancing the bonds on the basis of 24.81 cents per dollar of principal, disregarding interest. A small balance of the proposed loan, about $2500.00, was authorized to be used for certain expenses of the refinancing process, bond counsel's opinion, engraving bonds, etc. The proposal made in the R. F. C. resolution was submitted to the bondholders' committee, which by that time had on deposit about eighty-seven per cent of the bonds of the three districts. The bondholders came to the conclusion that they preferred cash in the amount of 24.81 cents per dollar rather than the somewhat uncertain prospect of being able to recover over a period of

twenty or more years what they might salvage under the agreement of August 18th, 1932. [Tr. pp. 199, 200.]

7. The bonds of the Mutual Water Company, $170,000 in amount, or about 4% of the whole debt, were secured by private trust deed executed by the company. This trust deed constituted a first lien upon the irrigation system, and, being in default, was subject to foreclosure at any time. The holders of these bonds considered themselves to be in a preferred position and insisted upon payment at the rate of fifty cents per dollar for their bonds. An approach was made to the R. F. C. to permit this alteration of the terms of its resolution, but such change was refused. Thereupon the group representing the bonds of the three districts agreed that from the money to be paid for their bonds should be deducted enough to increase the payment to the Mutual Water Company bondholders to fifty cents, which left the amount payable for district bonds at 23.248 cents per dollar. [Tr. pp. 223, 224.]

8. The district board, by resolution, accepted the proposed loan and submitted to the voters at an election the proposition whether a refunding bond issue in the amount of $1,039,432.00 should be approved. The voters approved the refunding bonds on June 15th, 1934. [Tr. p. 223.] Under date of August 7th, 1934, two contracts were executed between R. F. C. and the district looking toward the conclusion of the proposed loan. These contracts, however [Exhibit 19, Tr. p. 225, and Exhibit 20, Tr. p. 236], specifically provided that the R. F. C. might purchase the old securities; that when *all* the old securities were acquired by the corporation the loan should be consummated and the refunding bonds issued and that prior to the time all the old securities were so acquired the district

should pay the Corporation four per cent on the amounts theretofore disbursed by it, but that the Corporation could at any time require the district to pay in full the amount due on the old securities according to the terms thereof.

9. On October 31st, 1934, the R. F. C. disbursed, through the Federal Reserve Bank at Los Angeles, approximately $1,000,000, pursuant to its instructions to the Federal Reserve Bank to *purchase* the bonds in question. The R. F. C. thus acquired approximately $3,960,000 of the old securities, or more than ninety-four per cent in amount of all the old securities and more than ninety-two per cent in amount of each of the several bond issues here involved. By successive additional purchases, R. F. C. has acquired and held at the date of the trial in the court below $4,043,730.36 face value of the old securities, or 96.76 per cent, and more than 95 per cent of each individual issue. The non-assenting and unknown bondholders held bonds aggregating $134,600.00, or 3.24 per cent. Of this amount the appellants herein hold $79,000.00, or 1.88 per cent. [Tr. pp. 166, 169, 224.]

10. The holders of the bonds issued by the Palo Verde districts shared the same fortune as the farmers. After the default in May, 1930, trading on the market in these bonds was "flat", that is, the price did not take into account the amount of accumulated unpaid interest. Schedules of sales made up by a bond dealer specializing in these bonds show that in 1930 and 1931 the bonds sold at 10 to 14 per cent of principal. From 1931 to the beginning of 1933 they gradually declined to 2. $20.00 cash would buy a bond of the face value of $1000.00, with all unpaid coupons attached. The schedules show twenty-two sales at prices from 2 to 5. After the announcement of the

proposed R. F. C. loan, the market price of the bonds slowly increased to 21½ on November 1, 1934. Thereafter no sales have been made.

(Exhibit 4, containing the schedules of Palo Verde bond sales above mentioned, is printed in the appendix to this brief, commencing at page 1.)

11. On March 29th, 1935, the district filed a petition for readjustment of its debts, under Section 80 of the Bankruptcy Act, in the United States District Court for the Southern District of California. A hearing was held in October, 1935, and the United States District Judge thereafter filed his opinion, holding that the plan of readjustment was fair and equitable and should be approved. The findings and decree were prepared and on his desk for signature at the time the Supreme Court of the United States rendered its decision in *Ashton v. Cameron County Water Improvement District No. 1,* 298 U. S. 513. Solely by virtue of the unconstitutionality of Section 80, as determined by the Supreme Court, the District Judge dismissed the proceeding, and this court, upon the same ground, dismissed the district's appeal. [Tr. pp. 295, 298.]

12. Thereafter, appellants herein, except Covell, on December 29th, 1936, obtained an *alternative* writ of mandate from the Superior Court of Riverside County, directed to the district, its officers and its depositary, commanding them to pay appellants' claims on their bonds before making any payment to the R. F. C., or, in the alternative, to show cause why they should not do so. The district, its officers and depositary did show cause by demurrer, which demurrer was sustained by the Superior Court. An amended petition was filed by appellants herein

but no further proceedings have been held in this cause. [Tr. pp. 303, 306.]

13. The 1937 California Legislature adopted an act designated the "Irrigation District Refinancing Act" (Stats. Cal. 1937, Chap. 24), under which a court proceeding for the relief of collapsed irrigation districts was authorized. This proceeding, briefly, was to be initiated by the petition of the district, setting forth a proposed plan of readjustment, followed by notice to the bondholders and a first or preliminary hearing before the trial court, in which the court should examine into the merits of the proposed plan and determine whether it was fair, equitable and for the best interest of the creditors affected thereby. If the court should so hold, then an interlocutory decree to that effect was to be entered. The proceeding was then to be continued for a second phase, which, in essence, should be a hearing for the condemnation of the bonds held by the non-assenting creditors. The fair value of the bonds was to be determined and, upon payment thereof, a final decree of condemnation was to be entered. [Op. Br. Appendix p. 1.]

14. The district, in April, 1937, filed in the Superior Court its petition under the above mentioned act. Appellants herein answered and a trial was held, covering approximately a week, in November, 1936. On April 25th, 1937, the Superior Judge filed his opinion, holding the act constitutional and holding the plan of readjustment to be fair, equitable and for the best interests of the creditors, and directed findings to be prepared accordingly. On the same day that this opinion was received by counsel the Supreme Court of the United States, in *United States v. Bekins,* 304 U. S. 27, in a proceeding involving Lindsay-

Strathmore Irrigation District of Tulare County, California, held Sections 81 to 84 of the Bankruptcy Act constitutional. Sections 81 to 84 had been enacted August 16, 1937, *after* the commencement of the proceeding in the state court. Its constitutionality was in doubt until the decision in the *Bekins* case.

15. Faced with the alternatives of proceeding further under the state act and testing through the higher courts the constitutionality thereof, which appellants herein vehemently assailed, or dismissing that proceeding and filing a peition under Sections 81 to 84 of the Bankruptcy Act, the district took the latter alternative. The Superior Court granted a motion to dismiss without prejudice the proceeding in that court. The District Court accepted jurisdiction of the petition under Sections 81 to 84. A hearing on this petition was held on July 18, 1938. On August 4, 1938, the District Judge filed his opinion, holding again that the plan was fair, equitable and for the best interests of the creditors, and findings and interlocutory decree were entered accordingly.

16. At none of the three court hearings which have been held in connection with these three successive proceedings for the refinancing of the district has any objector put on a single witness to controvert the factual showing made by the district that it is unable to pay its debts as they mature or that the suggested plan is fair, equitable and for the best interest of the creditors themselves. Beyond a few documents of minor importance, appellants have offered no evidence. The trial judges have successively held in the three cases that the plan represents the best that can be done for the creditors and is fair.

17. By 1934, 72.96 per cent of the lands in the district had been deeded to the district for delinquent taxes, and in the following year an additional 26.69 per cent, making an aggregate of 99.66 per cent, were likewise deeded to the district. [Ex. 28, Tr. p. 264.] By 1937 81.4 per cent of the lands in the district were likewise deeded to the state for delinquent county taxes. [Ex. 37, Tr. p. 285.] It was evident as early as 1934 that, in addition to the refinancing of the bonds, it was imperative that measures be taken to return the lands in the district to private ownership, in order that the district might continue to function and be able to collect a tax income. The necessity of such measures also existed because it was essential that the remaining farmers of the valley regain in some manner title to the lands which they had lost. Without title to their lands they could not be held together to form a nucleus for the rehabilitation of the district. Accordingly, after mature deliberation and study of the problem by the district board and a number of committees, a plan was adopted by the district board and approved by the Boards of Supervisors of Riverside and Imperial Counties, the State Controller of California and the Reconstruction Finance Corporation. Under this plan, approximately 49,000 acres of the 89,000 acres in the district were resold to the former owners at a price of five per cent of the 1929 assessed valuation, or a maximum of $5.00 per acre. A second plan was later adopted, under which the former owners were given a second opportunity to buy at an increased price, twenty-five per cent of the assessed valuation, but only two or three such purchases were made. Under a third plan, placed in effect in 1936, the district has sold several thousand acres of additional land, mostly wild brush land, for an average price slightly under $8.00

per acre, but with the requirement that the purchaser improve the land for cultivation. The contracts under these three plans contain conditions subsequent for forfeiture of the title unless the current district and county taxes were paid. The experience of the district and the county since 1934 has been that the taxes levied have been paid. The area in cultivation has gradually been increased until in 1937 (after allowing for land farmed to two successive crops) there were 29,300 acres in cultivation. [Tr. pp. 269 to 274.]

The present economic situation in the valley may be summarized as follows:

The major crops are cotton and alfalfa. [Ex. E, Tr. p. 254.] Cotton, the larger in acreage, has been seriously damaged in recent years by an insect infestation and will have to be reduced. [Tr. pp. 182, 310, 311.] Alfalfa also has suffered from pests. [Tr. p. 311.] Present costs, district tax and water toll, have aggregated $5.50 to $7.50 per $100.00 assessed valuation or per acre. [Tr. p. 269.] Five farmers of many years' experience testified that the land could not produce enough to stand a tax and toll greater than from $5.50 to $7.00 per acre. [Tr. pp. 309, 312, 313, 321, 322.] Expert witness W. D. Wagner testified to $7.00 per acre. [Tr. p. 288.] The maximum eventual acreage cultivated will be about 40,000 acres. [Tr. pp. 187, 288.]

If a writ of mandamus were issued, requiring a tax levy for 1937-38 to raise all matured principal and interest on the outstanding bonds, the amounts necessary to be raised would be, for principal, $931,500.00, and for interest, $2,024,317.51, or an aggregate of $2,954,817.51. The tax

rate necessary to raise this sum would be $112.17 per $100.00 assessed valuation. [Ex. 30, Tr. p. 267.]

Assuming that this rate were levied and paid in full, the unpaid maturities of principal on the remaining bonds would amount to $3,242,830.36. [Tr. p. 266.] The future tax rates to pay maturing bonds and interest alone would be as follows:

1938	$14.41 per $100
1939	14.37
1940	14.85
1941	15.05
1942	15.09
1943	13.06
1944	12.69
1945	12.31

If the district tax, *plus* water toll and county tax, were to be raised to $12 or $15 per acre, "there would be no farming at all. The farmers would abandon their places wholesale and try to get them a job." [Tr. p. 314.] As another witness put it: "If the taxes and toll were raised to $10 the farmers would go somewhere else." [Tr. p. 321.] "The system would have to be abandoned for lack of revenue." [Tr. p. 322.]

Considerable capital expenditure, for drainage, reconstruction of wooden structures on canals, equipment, etc., confronts the district. [Tr. pp. 249 to 251.] The district is still operating ten 1917 to 1927 model "T" Ford trucks. [Tr. p. 250.]

ARGUMENT.

A. APPELLANTS ARE NOT ENTITLED TO URGE ELEVEN OF THEIR FOURTEEN POINTS.

We quote from appellants' opening brief (p. 9):

> "When the cause came on for hearing before the District Judge objections to the introduction of any evidence were made [Tr. p. 148] on the grounds that as shown by the facts admitted (1) there was a proceeding pending in insolvency under the state law; (2) the cause was *res judicata;* (3) the plan had been carried out, out of Court. This objection was overruled."

The same three points are stated in more amplified form in the transcript of the hearing [pp. 148, 149].

There was no argument before the trial court on any points other than the three mentioned above.

In this Court, appellants file an opening brief of 120 pages with an appendix of 88 pages, in which they present to this Court 14 points, which include the three above mentioned. These points are summarized (Op. Br. pp. 10, 11) as follows:

> "The interlocutory decree confirming the plan of composition herein should be reversed because:
>
> "1. The District Court was without jurisdiction to enter its decree touching the governmental and fiscal affairs of the Palo Verde Irrigation District, by the terms of Chapter IX;
>
> "2. The pendency of the insolvency proceeding under Cal. Stats. 1937, Chapter 24, was a bar to these proceedings;

"3. The cause is *res judicata;*

"4. The R. F. C. is not a creditor affected by the plan and cannot vote upon the proposition;

"5. The plan had already been consummated long prior to the filing of the petition;

"6. The judge failed to classify the creditors properly;

"7. The plan is grossly unfair and inequitable;

"8. The plan is not proposed in good faith;

"9. The State of California is the owner of the assets and may not repudiate its public debts, nor can the district, a public trustee, take bankruptcy;

"10. Trust funds and property are unlawfully taken by the proceeding;

"11. The liability of juristic persons not before the Court is unlawfully voided;

"12. The district is not authorized by law to carry out the plan.

"13. The State of California cannot under its own Constitution consent or be a party to these proceedings;

"14. Chapter IX is unconstitutional as applied in these proceedings."

By comparison it will be observed that points 2, 3 and 5 above listed were the points urged in the trial court. Appellee respectfully submits that appellants are not entitled to urge upon this Court contentions which were not brought to the attention of the District Judge, which were not therefore considered or ruled upon by him, and as to which appellee had no opportunity to furnish light by additional evidence.

It is settled by innumerable cases both in the federal and state courts that an appellate court will ordinarily not consider points which were not urged in the trial court.

As long ago as 1843, the Supreme Court in *Bell v. Bruen,* 1 How. 169, 187, 11 L. ed. 89, 96, held, with respect to a contention:

> "The record shows that this ground of defense was not brought to the consideration of the Circuit Court; we do not therefore feel ourselves at liberty to express any opinion upon the question."

The Court says as to a second contention:

> "To this, and all other questions raised here, on which the court below was not called to express any opinion, we can only give the same answer, given to the next preceding, supposed ground of defense."

The Court says of an appellant's contention in *Virtue v. Creamery Package Mfg. Co.,* 227 U. S. 8 at p. 38, 57 L. ed. 393, 407:

> "But the contention was not made in the circuit court, nor was it made in the circuit court of appeals. . . . It is manifest, therefore, that the separate liability of the Creamery Package Manufacturing Company is an afterthought and urged in this Court for the first time." (Judgment affirmed.)

In *Duignan v. U. S.,* 274 U. S. 195, 200, 71 L. ed. 996, the Court says, in refusing to consider a constitutional point which appellant raises for the first time on appeal, in challenging the equity jurisdiction of the Court:

> "This court sits as a court of review. It is only in exceptional cases coming here from the federal courts

that questions not pressed or passed upon below are reviewed." (Citing eight decisions of the Supreme Court.)

The same rule has been repeatedly followed by the various Circuit Courts of Appeals.

In *Supreme Forest Woodmen Circle v. City of Belton, Tex.*, 100 Fed. (2d) 655 (C. C. A. 5), which was a case rising under the same Act as the present proceeding, the contesting creditors of the city urged in the Circuit Court of Appeals two contentions raised in the trial court, and two other points not raised below. As to the new points the Court holds at page 658:

> "We need not sharpen our pencils to determine whether, if these warrants are excluded from the count, there would remain the required 66⅔% of acceptances. Nor need we consider whether the article appellants invoke has been superseded by that on which the appellee relies. For we think appellants are in no position to press these points here against the order.
>
> "We think this is so, because appellants did not make their point below in any form; . . ."

In *Deutser v. Marlboro Shirt Co.*, 81 Fed. (2d) 139 (C. C. A. 4), the Court holds at page 143:

> "It is well settled that only in very exceptional cases can a point not brought to the attention of the court below and not passed upon by that court be raised upon appeal." (Citing two U. S. cases and three cases from 4th Cir.)

In *Foster & Kleiser Co. v. Special Site Sign Co.,* 85 Fed. (2d) 742 (C. C. A. 9), the Court holds at page 571:

> "Neither of these contentions were presented to the trial court. It was assumed in the trial court that the statute of limitations was properly pleaded, . . . In any event, therefore, appellee cannot here claim waiver, having treated appellants' plea of the statute as sufficient upon the trial."

In *Potts v. City of Utica,* 86 Fed. (2d) 616 (C. C. A. 2), the Court at page 619, referring to a point raised for the first time on appeal, holds:

> "It is enough to dispose of this point that it was not raised on the trial. . . ."

Authorities might readily be multiplied. The soundness of the reasons of policy upon which the above mentioned cases rest can hardly be disputed. Appellants should not be permitted to hold "trick" points behind their backs in the trial court and reserve them for the appellate courts. This practice is neither fair to the trial court nor to the appellee, and is not conducive to the prompt or efficient administration of justice.

The foregoing argument is not written, however, because appellee has no answers to the new points raised by appellants in this Court. Appellee proposes hereinafter to outline the answers to all of appellants' points so that this Court may see that no fundamental miscarriage of justice would ensue if the rule hereinabove contended for is applied.

To avoid confusion the following discussion of appellants' fourteen points is arranged under the successive headings used in appellants' opening brief, which headings are hereinafter quoted.

B. APPELLANTS' FOURTEEN POINTS.

First Proposition: "By the Terms of the Statute the Court Was Without Jurisdiction."

This point is among those not raised in the trial court.

Appellants build their argument upon the terms of the clause in Section 83(c) of the Bankruptcy Act (11 U. S. C. 403c), which provides that the Court "shall not, by any order or decree, in the proceeding or otherwise, *interfere with* (a) any of the political or governmental powers of the petitioner; . . ." They urge that, because any order made under the section must interfere with such powers, the appellee can have no relief under the act.

Appellants argue this proposition through 20 pages of their brief (pp. 11 to 30). They labor to ascertain whether there was any difference between the former Chapter IX of the Bankruptcy Act, which the Supreme Court held unconstitutional in *Ashton v. Cameron Co. Water Improvement District No. 1,* 298 U. S. 513, 80 L. ed. 1309, and the present Chapter IX, which was held constitutional in *U. S. v. Bekins,* 304 U. S. 27, 82 L. ed. 1137, and whether the Supreme Court in the *Bekins* case overruled the *Ashton* case. It appears to us that the answer to appellants' proposition is very clear and simple. The Supreme Court of the United States in the *Ashton* case held the former Chapter IX unconstitutional and its decision in that respect has been followed without question by the Circuit and District Courts throughout the country.

This Honorable Court has repeatedly followed the *Ashton* decision as the law (*e. g., In re Imperial Irrigation District,* 85 Fed. (2d) 1019, 87 Fed. (2d) 355: *Semble, Chicot County Drainage District v. Baxter State Bank* (C. C. A. 8), 103 Fed. (2d) 847). Also the Congress, in effect, recognized the decision in the *Ashton* case. In adopting the Chandler Act in 1938 (52 Stat. 840) it renumbered Sections 81 to 84 as Chapter IX, in place of the original number, Chapter X, thus admitting that old Chapter IX was not law.

In the *Bekins* case the Supreme Court squarely and explicitly held that a California irrigation district, the Lindsay-Strathmore Irrigation District, was constitutionally entitled to the relief provided by Sections 81 to 84. The Lindsay-Strathmore District was organized under the California Irrigation District Act. Appellee was organized under a special act of the California Legislature, designated the Palo Verde Irrigation District Act. The structure and details of the two acts are, in the main, the same. Both acts are authorized by Article XI, Section 13, of the State Constitution of California. (*Palo Verde Irr. District v. Seeley,* 198 Cal. 477 at p. 483.)

The Palo Verde Irrigation District Act was held constitutional by the state Supreme Court in *Barber v. Galloway,* 195 Cal. 1.

In 1932 companion cases brought by three irrigation districts organized under the California Irrigation District Act and by the Palo Verde District were decided by the state Supreme Court. In *Palo Verde Irrigation*

Dist. v. Jamison, 216 Cal. 740 at p. 741, the Court said, referring to the Palo Verde Act:

> "We find no substantial difference between the provisions of this act, subsequent to said amendment of 1927, and the said California Irrigation District Act, sufficient to warrant a distinction between this case and the said three companion cases."

The essential nature of the districts organized under the two acts mentioned is, for all purposes involved in the present case, identical. Appellants have not indicated any differentiation between the two acts. The Supreme Court has held in the *Bekins* case that, under Sections 81 to 84 of the Bankruptcy Act, the Court has jurisdiction to grant to the Lindsay-Strathmore Irrigation District the relief provided by Sections 81 to 84 of the Bankruptcy Act. This being true, the District Court likewise had jurisdiction to grant the same relief to the Palo Verde District.

We are not particularly concerned with the ramifications of appellants' argument as to the governmental or political character of appellee. It should be pointed out, however, that the district involved in the *Ashton* case was held to be a political subdivision and that Section 79 of old Chapter IX classified all the taxing agencies to which the act applied as a "municipality or other political subdivision" of a state. The California Supreme Court has repeatedly held that a California irrigation district is not

a municipal corporation or a political subdivision of the state.

Wood v. Imperial Irrigation Dist., 216 Cal. 748, 752, 753;

Turlock Irr. Dist. v. White, 186 Cal. 183, 187;

Whiteman v. Anderson-Cottonwood Irr. Dist., 60 Cal. App. 234, 237;

El Camino Irr. Dist. v. El Camino Land Co., 96 Cal. Dec. 505, 508.

Coming back to the clause of Section 83(c) upon which appellants' argument is founded, namely, the clause providing that the Court shall not "interfere with (a) any of the political or governmental powers of the petitioner," appellants insist (Op. Br. p. 23) that any order made by the trial court must "interfere" with the functions of the district. In view of the decision in the *Bekins* case this contention cannot be sustained. The Supreme Court has held the act effective as applied to a California irrigation district. If any relief granted by the Court must "interfere", in the sense intended by the act, with the functions of the district, the *Bekins* decision could not have been rendered.

This is definitely recognized in *Supreme Forest Woodmen Circle v. City of Belton, Texas* (C. C. A. 5), 100 Fed. (2d) 655. The Court says, at page 657, referring to the *Bekins* case:

". . . it sustained the act as to the irrigation district on the ground that it was *not an attempt to*

interfere with its governmental functions, but only an extension to taxing districts of the benefits of the relief which, varying in form, but the same in substance, had been extended by other bankruptcy acts to persons, associations, and corporations."

Again the Court says, on page 657, referring to the act:

"And it concerns itself with the city as a debtor, not compulsorily, nor by way of *interference* with it, but only upon the city's invocation, and as an aid and assistance to it and its creditors."

This Court will realize that it is only upon the application of the district itself that the trial court could grant any relief under the act. The relief granted does not oppose or upset or prevent the carrying out of the functions of the district. Viewed broadly, such relief is a positive aid to the functioning of the district. It was in such a sense that the Supreme Court in the *Bekins* case must have interpreted "interfere", as used in Section 83. Such an interpretation is by no means unusual. Thus in *Conger v. Italian Vineyard Co.,* 186 Cal. 404 at p. 407, it is stated:

"Considered in its broadest aspect, the term 'interfere' bears the significance of 'disarrange,' 'disturb,' 'hinder'."

The term is defined in 33 *Corpus Juris* 267 as:

"To interpose; to prevent some action; sometimes in a bad sense, to intermeddle; to check or hamper. In its broadest aspects the term 'interfere' bears the significance of 'disarrange,' 'disturb,' 'hinder'."

"The words 'interfere with or affect any settlement' mean invalidate or render inoperative any settlement."

In re Armstrong, 21 Q. B. D. 264, 270, 57 L. J. Q. B. 557;

In re Onslow, 39 Ch. D. 622, 625.

See, also, *Webster's New International Dictionary,* 2nd Ed., and the *Century Dictionary and Encyclopedia,* Vol. V.

Since the relief sought is in aid of the continued functioning of the district, and, as shown in the case at bar, without such aid the district cannot continue to function and may be forced to terminate its operations, the decision in the *Bekins* case, if it required justification in this respect, is amply justified.

Counsel would have this Court reverse the *Bekins* case because of the decision in *Erie R. R. Co. v. Tompkins,* 304 U. S. 64; 82 L. ed. 1188. The *Bekins* case was argued April 7, 1938, and decided April 25, 1938. A rehearing was denied on May 23, 1938. The *Erie* case was argued January 31, 1938, and decided April 25, 1938, the same day on which the decision in the *Bekins* case was announced. Both, accordingly, were under consideration by the Court at the very same time. The Court denied a rehearing in the *Bekins* case a month after the *Erie* case was decided. Counsel for appellants in the case at bar were the counsel for appellee bondholders in the *Bekins* case, and had full opportunity to present to the Court in the *Bekins* case the theory which they now advance to this Court. It is respectfully submitted that this Court cannot be expected, under the circumstances, to declare that the *Bekins* decision is not law, by reason of counsel's rather involved argument based on the *Erie* case.

Second Proposition: "There Is Another Action Pending in the State Courts of California Upon the Same Identical Cause of Action and Demanding Substantially the Same Relief, and That That Action Was Commenced and Pending Under State Law Prior to the Passing of Chapter X of the Bankruptcy Act Upon Which This Proceeding Was Prosecuted."

This contention was raised in the trial court.

Appellants argue that the pendency of the proceeding commenced by appellee in the Superior Court of Riverside County under the "Irrigation District Refinancing Act" [St. Cal. 1937, Ch. 24; Appendix to Op. Br. p. 1] is a bar to the present proceeding and therefore the District Court had no jurisdiction. This proposition assumes two things: first, that the State Act was constitutional, and, second, that the proceeding provided by the State Act was an insolvency act.

On the first point the hearing in the Superior Court consumed seven days, of which, as the writer recalls it, three solid days were devoted to argument as to the constitutionality of the State act. Present counsel for appellants, representing the same clients, then strenuously and lengthily argued that the State act was unconstitutional. They admit (Op. Br. p. 34) that "These appellants took the position at the time the action was filed in the State Court *and has continued to hold that position* that the state act is unconstitutional, . . ."

They do not now assert that it is constitutional. If it is not, then, of course, the Superior Court had no jurisdiction, and the proceeding was *coram non judice.* This Court can hardly be expected to follow appellants'

present argument unless appellants are willing to commit themselves as to whether the act on which they are now hanging their argument is a valid and existing act.

In the second place, the State act was not in any sense an insolvency act. It provided for a proceeding in two phases: the first phase or hearing being authorized under the police power of the State, the district and its creditors are brought together before a court of equity so that, for the protection of both the district and creditors, the Court might in an orderly way solve the question whether the proposed plan of readjustment was fair, equitable, and for the best interests of the creditors. In this proceeding, however, no injury could be done the non-assenting bondholders. Only those who assented would be bound by the interlocutory decree. *Volenti non fit injuria.*

The second phase or hearing authorized by the Statute was purely and simply a condemnation trial in which a court or jury should determine the fair value of the bonds, a judgment of condemnation should be entered, and the district be authorized to acquire the old bonds by purchase under the judgment and under the power of eminent domain.

The Statute itself [Appendix to Op. Br. p. 4] says:

> "Therefore, to meet this condition of emergency, the *police power* and the power of *eminent domain* are hereby invoked and such irrigation districts herein referred to are hereby authorized to institute and maintain the proceedings and actions as hereinafter set forth . . ."

It is crystal-clear that the legislature did not intend to invoke, nor did it invoke, any supposed power to regulate insolvency proceedings.

Appellee is perfectly willing to concede appellants' argument that if the Act is an insolvency Act it is unconstitutional. The Supreme Court so held in *United States v. Bekins,* 304 U. S. 27, when it said, at pages 53, 54:

> "In the instant case we have cooperation to provide a remedy for a serious condition in which the states alone were unable to afford relief . . . The natural and reasonable remedy, through composition of the debts of the district was *not available under state law* by reason of the restriction imposed by the Federal Constitution upon the impairment of contracts by state legislation."

On June 18, 1938, appellee moved the Superior Court to set aside its submission of the case, and to dismiss the case. At the same time appellants moved that judgment be entered against the district. Appellee's motions were granted and appellants' motion was denied. Thereafter, appellants sought to keep the State case alive by appealing from the Superior Court's rulings. In view of appellants' general demurrer and motion to strike the petition from the files of the State Court (Op. Br. p. 35), and their insistent contention that the State act was unconstitutional, appellants' appeal from a judgment of the Superior Court by which they were rid of the entire case seems rather insincere. They now want to keep the State proceeding alive, not because any decision rendered by the State Court could be acceptable or advantageous to them, but solely because they believe it might bar the jurisdiction of the Court in this cause.

Counsel cite a number of authorities to the effect that a State proceeding pending under an insolvency act at the time of the passage of the Bankruptcy Act, is not thereby terminated but may proceed to a conclusion.

Granting this, the State act in question was not an insolvency act and if it were, would be unconstitutional and void.

But it is not necessary to grant that State insolvency proceedings are unaffected by the enactment of Chapter X of the Bankruptcy Act. The original Bankruptcy Act of 1898 contained Section 71, which read:

> "Proceedings commenced under State Insolvency laws before the passage of this Act shall not be affected by it."

This section was *stricken out* by amendment in 1903. The manifest intent of Congress in striking out the section was that it should not continue to be the law. And this intent is directly in line with one of the major principles of Federal bankruptcy legislation, namely, that the jurisdiction of the bankruptcy court is, and in the nature of things must be, paramount, supreme and exclusive.

In re Watts, 190 U. S. 1, 27, 35, 47 L. ed. 933, 941, 944;

International Shoe Co. v. Pinkus, 278 U. S. 261, 265, 268, 73 L. ed. 318, 320, 322;

New York v. Irving Trust Co., 288 U. S. 329, 333, 77 L. ed. 815, 818;

Collins v. Welsh (C. C. A. 9), 75 Fed. (2d) 894, 99 A. L. R. 1319;

U. S. Nat. Bank v Pamp (C. C. A. 8), 77 Fed. (2d) 9, 99 A. L. R. 1370;

In re Faour (C. C. A. 2), 72 Fed. (2d) 719.

Third Proposition: "The Cause Is Res Judicata."

This proposition was argued in the trial court.

Appellants here contend that the judgment in the district's first proceeding under Section 80 is *res judicata* and a bar to this proceeding. Appellants proceed through some eight pages of their brief (pp. 43 to 51) to attempt to analyze the decisions in the *Ashton* case and *Bekins* case, and urge that the latter overrules the former. The Supreme Court did not say so. It did say the present statute (Sections 81 to 84) is constitutional. Appellee does not feel constrained to follow appellants' argument in detail, since only the Supreme Court can say whether it intended to overrule the *Ashton* case. This Court cannot possibly ascertain what considerations were in the minds of the nine justices, but were not expressed in their decision in the *Bekins* case.

However, the doctrine of *res judicata* has no application whatever to the kind of decision which was rendered in appellee's proceeding under Section 80. It will be remembered that the trial court in that proceeding, after a full hearing, determined and rendered its opinion that the plan of readjustment was fair, equitable and for the best interests of the creditors, and directed findings and judgment to be prepared. Before the findings and judgment were signed, the Supreme Court rendered its decision in the *Ashton* case, and the District Court thereafter, upon the sole ground of the unconstitutionality of Section 80 (Op. Br. p. 7; Tr. p. 298) dismissed the case.

We are quite in accord with the law as declared by Mr. Justice Harlan in *Southern Pacific R. R. Co. v. U. S.*, 168 U. S. 1, 48, and quoted (Op. Br. p. 51) by appellants, under which application of the doctrine of *res judicata* is

made to depend upon the determination of "a right, question, or fact distinctly put in issue and directly determined by a court. . . ." No right, question or fact was determined by the District Court in appellee's first bankruptcy case, other than the determination that the act was unconstitutional.

It is uniformly held that a dismissal for lack of jurisdiction is not a bar, under the rule of *res judicata*.

Waldon v. Bodley, 14 Pet. 156 at p. 161, 10 L. ed. 398, 400;

Phelps v. Harris, 101 U. S. 370 at p. 376, 25 L. ed. 855 at p. 857;

Smith v. McNeal, 109 U. S. 426 at p. 429, 27 L. ed. 986, 987;

Murray v. Pocatello, 226 U. S. 318 at p. 323, 57 L. ed. 239, 242.

In the last cited case, Mr. Justice Holmes, with characteristic clarity, states in a sentence the reason for the rule as follows:

> "Of course, if the court was not empowered to grant the relief whatever the merits might be, it could not decide what the merits were."

And the general rule of *res judicata* is stated in the leading case of *Hughes v. U. S.,* 71 U. S. 232 at p. 237, 18 L. ed. 303, 305, where the Court holds:

> "In order that a judgment may constitute a bar to another suit, it must be rendered in a proceeding between the same parties or their privies, and the point of controversy must be the same in both cases, *and must be determined on its merits.* If the first suit was dismissed for defect of pleadings or parties, or a misconception of the form of proceeding, *or the want*

> *of jurisdiction,* or was disposed of on any ground *which did not go to the merits of the action,* the judgment rendered will prove no bar to another suit."

Appellants would have this Court hold that the District Court's decision in the first bankruptcy case was equal to a decision that appellee, on the merits, was not entitled to the relief it sought. This is just the opposite of what the District Judge, as evidenced by his opinion, intended to decide. It would be ridiculously artificial and unreal to hold that a dismissal on the ground of unconstitutionality forever barred the courts from examining the merits of the cause, after a new and constitutional statute has been enacted.

We reiterate that the one thing determined by the District Court was that Section 80 was *unconstitutional.* If this be *res judicata,* then let it be remembered that the appellants in the cause at bar were parties to that decision *and are bound by it.* They cannot here be heard to urge that Section 80 was constitutional.

There is one more reason why dismissal of the first bankruptcy cause should not be deemed *res judicata.* In enacting Section 83, under which the present proceeding is brought, the Congress specifically provided in Subdivision (h) as follows:

> "(h) This chapter shall not be construed as to modify or repeal any prior, existing statute relating to the refinancing or readjustment of indebtedness of municipalities, political subdivisions, or districts: Provided, however, that the initiation of proceedings or the filing of a petition under Section 80 shall not constitute a bar to the same taxing agency or instrumentality initiating a new proceeding under Section 81 thereof."

It is apparent that the Congress took thought on the fact that many proceedings had been filed under Section 80, which the Court had declared unconstitutional, and that the Congress intended expressly to see to it that the existence of such former proceedings should not bar relief under the new statute. The specific language chosen by the Congress, "initiation of proceedings or the filing of a petition", perhaps was not fortunate, but it is clear beyond words what the Congress meant. There could have been relatively few proceedings under Section 80 in which the sole step taken by the petitioner was to initiate proceedings or file a petition. As the published reports show, there were many such cases in all stages of litigation from the filing of petitions to hearings and decisions before the Circuit Courts of Appeals. No rational ground exists upon which the Congress could be imagined to have discriminated between those proceedings which were tried and submitted for decision,—those proceedings in which the petition only had been filed, or those which were decided by the District Courts and pending in the Circuit Courts of Appeals. The same reason for eliminating the rule of *res judicata* must have existed in the mind of the Congress as to all of these proceedings. *Idem ratio, idem lex,* or, as Section 3511 of the Civil Code of California anglicizes it: "Where the reason is the same, the rule should be the same." The Congress intended by Section 83(h) that those districts which had *prosecuted* proceedings under Section 80 should have the opportunity to apply for relief under Section 83. This Court, it is submitted, will not so apply the doctrine of *res judicata* as to thwart the intent of the Congress.

Fourth Proposition: "Reconstruction Finance Corporation Is Not a Creditor Affected by the Plan."

This proposition was not presented to the trial court.

Appellants here attack the finding of the trial court that R. F. C. owned more than 96% of the indebtedness affected by the plan of composition, and more than 95% of each of the issues mentioned in the petition. To support their attack appellants recite some of the proceedings leading up to the acquisition by R. F. C. of 96.76% of the old bonds. Appellants thus bring to this Court's attention certain of the facts, documentary and otherwise, which were considered by the trial court in rendering its decision. Appellants do not by any means furnish this Court with all the evidence on the subject.

If it were necessary to admit that the evidence before the trial court was conflicting, the attack upon the finding is nevertheless insufficient; if the evidence is conflicting then this Court will not disturb the finding. This rule is so elementary that the citation of authority is rather superfluous. All that is necessary is that there appear in the evidence some substantial support for the finding.

Burkhard Investment Co. v. U. S. (C. C. A. 9), 100 Fed. (2d) 642, 645;

Wilson v. U. S. (C. C. A. 9), 100 Fed. (2d) 552, 555.

Clark etc. Co. v. McAllister (C. C. A. 9), 101 Fed. (2d) 709, 714;

Wire Tie Mach. Co. v. Pacific Box Corp. (C. C. A. 9), 102 Fed. (2d) 543, 552.

Appellee respectfully submits that not only is there substantial evidence that R. F. C. is the owner of the

bonds in question, but that the evidence positively compels that conclusion.

The evidence relating to the transaction between the district and R. F. C. commences with July, 1933, in which month the District made application to R. F. C. for a loan under Section 36 of the Emergency Farm Mortgage Act of 1933. Such a loan was *conditionally* approved by R. F. C. by resolution adopted March 1, 1934.

Appellants are not accurate in stating (Op. Br. p. 58) that (1) "The plan set up in that resolution is the same plan brought forward as a plan of composition . . . in these proceedings", or (2) that "The plan has never been changed or modified". The fact is that the resolution in question is not the only act of the R. F. C. by which its position has been determined. It was not an immutable act. Nor is the plan of the resolution identical with, or very similar to, the plan involved in the present proceeding. It may be said that the resolution furnishes some background and some detailed provisions which may be found in the plan of composition. Beyond this, one may not accurately go.

The resolution appears in the transcript [pp. 201 to 223]. After preliminary recitals, it states [p. 203]:

> "Now, Therefore, Be it Resolved, that there is hereby authorized a loan of not exceeding $1,039,423.00, to or for the benefit of said District, *subject, however, to the following terms and conditions: . . .*"

Thereupon follow detailed conditions precedent and requirements which cover 19 pages of the printed transcript. It is not necessary to examine more than a few of these conditions. It is provided that the holders of old securities shall deposit them with committees, depositaries

or other responsible representatives satisfactory to them. The resolution continues [Tr. p. 204]:

> "No loan shall be made hereunder (a) unless *all* of the Old Securities shall be thus deposited; or (b) unless the Division Chief shall deem that such a large proportion of such securities has been deposited as will satisfactorily accomplish the purposes of this Corporation in authorizing this loan . . . ."

Here it may be stated that the Division Chief has at no time made a determination that deposit of less than all of the securities will be satisfactory.

Paragraph 5 of the Resolution [Tr. pp. 207 to 210] sets up two possible methods of consummating the proposed loan. "Such loans shall be effected in any of the following ways as said Division Chief and Counsel shall direct: (a) If the Division Chief shall deem it advisable to have the deposited securities cancelled immediately upon the issuance of the New Bonds, such loans may be advanced directly to the District *or* to the Owners' Agents and consenting owners at the time of the surrender and cancellation of the Deposited Securities, but only upon receipt by this Corporation of New Bonds having a principal amount equal to the amount of the loans it has made hereunder."

The Division Chief has never made such a determination and no new bonds have been executed. Accordingly this method has not been followed.

The resolution proceeds: "(b) In the event that the Division Chief shall deem it necessary to keep any or all of the Deposited Securities alive for a greater or lesser length of time *in order to maintain a parity of rights as between the holders of the Deposited Securities and the rights of the holders of Old Securities who did*

not deposit same, or for any other purpose, then such loans may be made directly to the Owners' Agents and consenting owners. All such loans shall be represented by *notes* of said consenting owners or Owners' Agents and the Deposited Securities shall be *pledged* as security therefor. . . . *The district shall not be a party to such note* but in case it shall pay the interest thereon promptly when and as the same falls due, the Corporation will accept such interest payments and will thereupon give credit to the district for payment of the interest for such period on all the Deposited Securities at that time held by this Corporation, it being expressly provided, however, that nothing contained in this resolution shall be deemed to limit the right of this Corporation *to enforce full payment of interest or principal on Deposited Securities* it may hold, at any time when it may deem it advisable to do so in order to protect its rights as holder of the Deposited Securities against any rights claimed by the holders of Old Securities that have not been deposited. . . ."

The plan suggested in this provision was not carried out. No loans were made to owners' agents or consenting owners nor did they or the district execute any note or notes.

After the adoption of the resolution, the district and R. F. C. entered into two separate contracts, both of which are dated August 7, 1934. The longer of these two contracts [Exhibit 19, Tr. p. 225] was authorized by the District Board on July 24, 1934. It provides [Tr. p. 227]: "That R. F. C. agrees to loan an amount not to exceed $1,039,423.00 to or for the benefit of the said district *in accordance with, and subject to, the terms and conditions* more fully specified in said resolution of the R. F. C., dated March 1, 1934, . . ."

The condition requiring deposit of all of the old securities has not been complied with. The determination of the Division Chief that deposit of less than all will be satisfactory has never been made. The agreement provides [Tr. p. 229] that R. F. C. *"agrees, subject to full compliance with all the conditions and terms of the resolution of R. F. C. of March 1, 1934"* to take delivery of refunding bonds and provide funds in the amounts authorized by the resolution, "provided that R. F. C. may in the alternative, as provided for in said resolution of March 1, 1934, *make its loan or loans directly to the owners' agents and consenting owners* of the old securities upon receiving the note or notes of such consenting owners or owners' agents . . ."

This, as hereinbefore noted, was not carried out.

The second agreement of August 7, 1934 [Exhibit 20, Tr. p. 236], was approved by the District Board on August 7, 1934. It provides an entirely new method of procedure not expressed in the resolution of March 1, 1934 [Tr. p. 237]:

> "(1) The Corporation may make disbursements at any time it is willing to do so for the purpose of *acquiring* any portion of the Old Securities available for refinancing, . . ."
>
> "(2) Until the Old Securities *acquired* and held by the Corporation by reason of or in connection with such disbursements are exchanged for New Bonds issued by the District, or are otherwise refinanced as provided in said resolution, they shall at all times continue to be and constitute obligations of the District for the full face amount thereof.
>
> "(3) When *all* of the Old Securities are made available for refinancing and are *acquired* by the Corporation the reduction in the district's indebted-

ness will be effected to the extent and in the manner provided in said resolution authorizing said loan, and the parties hereto will do all acts and take all steps and proceedings necessary or appropriate to facilitate and accomplish expeditiously such result. . . ."

. . . . . .

"(6) During the time the Corporation holds any of said Old Securities and the same have not been refinanced by the issuance and delivery of New Bonds or as otherwise provided in said resolution, the district will annually levy and collect taxes and assessments in sufficient amounts to pay, and will pay, the Corporation each year a sum that will yield to the Corporation four per cent upon the total amount of the disbursements made by it in acquiring such Old Securities, or rights or interests in or to such Old Securities; provided, that the Corporation can during any such time require the District to pay any larger sum, *not exceeding the amount due on said Old Securities according to the terms thereof, in which event the district will so levy, collect and pay such larger sum.*"

It is thus clear beyond peradventure of doubt that by the terms of the documents above outlined, R. F. C. expressly retained the power to enforce to their full face value the principal and interest of all of the old bonds which it should acquire.

The underlying purpose is plain. R. F. C. did not choose partially to refinance the district and leave the non-assenting bondholders' position improved by that fact, to the detriment of both R. F. C. and the district. After the execution of the above contract, its intention was carried into execution by the specific document under which it proceeded to acquire 96.76% of the old securities.

The old securities were on deposit with the Security-First National Bank of Los Angeles in an escrow which had been open for some months. On October 6, 1934, R. F. C. addressed to the Federal Reserve Bank of San Francisco, Los Angeles Branch, a letter [Exhibit No. 5, Tr. pp. 153 to 164] by which it gave the Federal Reserve Bank explicit and voluminous instructions as to what it wanted done. It says:

> "This Corporation has *authorized* a loan of not to exceed the sum of $1,039,423.00, for the purpose of enabling Palo Verde Irrigation District, a public corporation, organized under the laws of the State of California, to reduce and refinance its outstanding bonded indebtedness.
>
> "We *now* wish to *purchase* outstanding bonds of the district (either issued by the district or assumed by it) in an aggregate principal amount of not to exceed $4,174,330.36 on the basis of a payment at the rate of 24.81 cents for each dollar principal amount of the bonds so *purchased* and to also *purchase* a $4,000.00 promissory note executed by Palo Verde Irrigation District and now held by Bank of America at Los Angeles, which note is to be *purchased* at the rate of 25 cents for each dollar of principal due therefor.
>
> "We are forwarding a copy of this letter to L. A. Hauser, President of the district, who will make arrangements for the delivery of the securities to be *purchased.*"

The Court has observed that in the foregoing quotation from the instructions the precise and definite word "purchase" is used *five* times. In the remaining portions of the

letter of instructions the same word or its derivatives has been used *ten* times more. Thus the intention of R. F. C., which was furnishing the money, is evidenced in all fifteen times by the use of the same term. The term has a definite legal meaning and, in view of the last agreement between the parties [Exhibit 20] was unmistakably used consciously by R. F. C.

It is respectfully submitted that the transaction which followed, whereby the Security-First National Bank of Los Angeles delivered to the Federal Reserve Bank approximately $4,000,000 face value of old bonds and received in exchange approximately $1,000,000 in money, was and could have been nothing whatever but a *purchase* by R. F. C., whereby R. F. C. acquired title to the bonds. No note of the district or of former owners of the bonds or of any owners' agents was executed. No unconditional obligation on anyone's part existed for which the bonds could have been delivered and pledged as collateral. The only obligation on the part of the district toward the R. F. C. arose under the resolutions adopted by R. F. C. and the District Board respectively and the contracts between them, all of which, as is hereinbefore demonstrated, were conditional and preliminary in their nature.

Appellants urge that the terms of certain of the resolutions adopted by the District Board contradict the Court's finding. It is true that at times the transaction was loosely referred to as a "loan". But it is plain beyond words that the loan referred to was one which was yet to be consummated and has never yet been consummated.

The district, it is true, earnestly and sincerely desires that such a loan shall be consummated. It has waited five years for such a consummation. It hopes that the loan may be made. Nevertheless, the true nature of the situation, both on the part of the R. F. C. and the district, is clearly that of successive steps leading to a result which has not yet been achieved and apparently will not be achieved until all of the old securities are in some manner brought in for refinancing.

Appellants suggest, rather than argue, that it was *ultra vires* for the district to spend its money for the purpose of bringing about a transfer of the old securities from the former holders to the R. F. C. If this were the whole of the transaction, perhaps the district had no such authority But when that act is viewed as a step in the course of dealings by which it was anticipated that all of the district's indebtedness would ultimately be refinanced, the public benefit to the district and the justification for expenditure of its funds are clear enough.

Appellants also challenge the purchase of any bonds by R. F. C. as *ultra vires,* under section 36 of the Emergency Farm Mortgage Act of 1933, as amended. (Title 43, Sec. 403, U. S. C.) The last sentence of this section reads:

> "When application therefore shall have been made by any such district, political subdivision, company, or association any loan authorized by this section may be made either to such district, political subdivision, company, or association or to the holders or representatives of the holders of their existing indebted-

ness, and such loans may be made upon promissory notes collateraled by the obligations of such district, political subdivision, company, or association *or through the purchase of securities issued or to be issued by such district, political subdivision, company, or association.*"

If this were not sufficient authority, it must be remembered that the above mentioned section 36 is not the only statute which grants powers to the R. F. C. It also has general powers, under Title 15, Ch. 14, U. S. C., among which (Sec. 604) it has the power, "to make contracts." This power is granted without limitation or qualification. The purchase of a bond is the making of a contract.

But regardless of any refined examination into the specific powers of R. F. C. or of the district, it must be realized that neither the State nor the United States is here complaining of any *ultra vires* act. The complainants are private persons, with whom R. F. C. has no relations whatever. Under familiar principles appellants have no right to question the authority of either the district or R. F. C. Particularly is this true when, as was held in *Pullman Co. v. Central Transportation Co.*, 139 U. S. 62, 63; 35 L. Ed. 69, where the objection of *ultra vires* is not brought to the attention of the trial court, the objector is not entitled to raise the question for the first time in the Supreme Court.

It will be remembered that under the decisions of both the Supreme Court of the United States and the Supreme Court of California, the objection that an act of a corpo-

ration is *ultra vires,* can only be raised by the sovereignty which gave it existence. Third persons cannot raise the question.

Union National Bank v. Matthews, 98 U. S. 621, 629, 25 L. Ed. 188, 190;

Reynolds v. First National Bank, 112 U. S. 405, 413, 28 L. Ed. 733, 736;

Fortier v. New Orleans Natl. Bank, 112 U. S. 439, 451, 28 L. Ed. 764, 768.

Jones v. N. Y. Guaranty Co., 101 U. S. 622, 628, 25 L. Ed. 1030, 1035;

Union Water Co. v. Murphey's Flat Fluming Co., 22 Cal. 620, 631;

McCann v. Children's Home, Inc., 176 Cal. 359, 364.

The theory is set up by appellants that the transaction by which R. F. C. disbursed its funds was one by which the money was disbursed to the district and the title to the bonds passed from the bondholders to the district, thence to the R. F. C. It is claimed that R. F. C. holds the bond as collateral to a pledge made by the district. Beside the fact that there are several missing links in the transaction, appellants' theory disregards the real nature of the proceedings.

The district's indebtedness, amounting to over four million dollars, was divided into approximately 7,000 separate bonds held by many hundreds, if not thousands, of individuals. R. F. C. did not attempt to deal directly with these individuals. That would have been utterly impracticable. Some one obviously had to act as intermedi-

ary and bring about the successive steps necessary to consummate the transfer of the bonds to R. F. C. The first steps consisted of the district's suggesting that the bondholders organize a bondholders' committee, which over a period of four years obtained the deposit with the Security-First National Bank of Los Angeles of approximately 87% of the bonds. Next, the district brought this group into a compromise with the group holding Mutual Water Company bonds. Next, the district caused an escrow to be opened with the Security Bank, through which these and other bonds should ultimately be transferred to R. F. C. Some one had to advise the Security Bank when the funds were available for the transfer and put it into communication with the Federal Reserve Bank. Finally, some one had to pay the expenses of the escrow, amounting to $950.00 [Tr. p. 177], not $1,400 or $1,500, as stated by appellants. (Op. Br. p. 73.)

Throughout these proceedings, the district acted as an intermediary, or catalyzer. It was interested, of course, in the successful outcome of the escrow. The bonds were not delivered to it, nor delivered by it to R. F. C. It received none of the proceeds. On the contrary, it bore the relatively nominal expense of the escrow. The dollars received by the Security Bank from R. F. C. were distributed among the former owners of the bonds. [Tr. p. 177.]

On the whole of the evidence the finding of the trial court that R. F. C. is the owner of the bonds it holds and is therefore a creditor affected by the plan is amply supported by substantial evidence and must be sustained.

Fifth Proposition: "The Plan Is One Fully Executed Out of Court, and Not Pursuant to the Statute."

This point is one of the three urged before the trial court.

Here appellants argue that the case at bar is comparable to *In re City of West Palm Beach* (C. C. A. 5), 96 Fed. (2d) 85 (erroneously cited Op. Br. p. 86.)

The dissimilarity between the factual situations in the two cases is, however, distinct and apparent. In the *City of West Palm Beach* case, five-sixths of the old securities had been actually exchanged by the former holders thereof for refunding bonds. The old securities had been surrendered for cancellation and refunding bonds delivered. The holders of the original bonds signed the acceptance of the plan of composition and were necessary to make up the percentage of creditors required by the act. That the fact of their acceptance of the new securities existed, and was the crucial point in the decision, is unmistakable. The Court says at page 86:

> "Whether the plan must have been offered and accepted as a plan of composition rather than as a plan of voluntary adjustment we need not decide, since the plan with its acceptance became incapable of presentation as a composition *because it had been largely executed.* It appears from the petition that more than a majority of the floating debts involved in the plan had been exchanged for new funding bonds and about five-sixths of the amount of the old bonds had been exchanged for new bonds. The owners of these were no longer acceptors of an executory plan, but had been fully settled with under it and no longer had any direct interest in it. They could not fairly be counted as voters before the court on the propriety of the plan."

The opinion concludes:

> "As the case was made by the petition there was no plan accepted by fifty-one per cent of the securities to be affected, but a plan the acceptors of which had converted themselves into holders of other securities which are not to be affected. The petition was properly dismissed."

It may be that under the statute, as existing at the time of the *West Palm Beach* decision, the Court was correct or incorrect, in holding that when creditors had exchanged their old securities for new ones they ceased to be the owners of the old securities and lost the right to consent to the composition proceeding. It is unnecessary to decide this question now.

The Congress has reversed the *West Palm Beach* case by adding to Section 83 new subsection (j), which reads:

> "(j) The partial completion or execution of any plan of composition as outlined in any petition filed under the terms of this title by the exchange of new evidences of indebtedness under the plan for evidences of indebtedness covered by the plan, whether such partial completion or execution of such plan of composition occurred before or after the filing of said petition, shall not be construed as limiting or prohibiting the effect of this title, and the written consent of the holders of any securities outstanding as the result of any such partial completion or execution of any plan of composition shall be included as consenting creditors to such plan of composition in determining the percentage of securities affected by such plan of composition."

That amendment is part of the Chandler Act, approved June 22, 1938, and effective September 22, 1938. It de-

clares that where actual exchange of securities has taken place under and in accordance with the plan, the holders of the old securities shall nevertheless be included as acceptors of the plan. This being the law, it is *a fortiori* clear (as it would have been in spite of the *West Palm Beach* case) that where no exchange of securities has occurred, the old securities are still outstanding, and the refunding bonds have never been issued, which is the case at bar, there is nothing to prevent the holders of the old securities from accepting the plan.

In the case at bar, R. F. C. has purchased, owns and holds more than 95% of each of the issues of bonds involved. It has not exchanged its old bonds for new ones. It has intentionally declined to do so, as evidenced by the provisions of the resolution of March 1, 1934, and the two contracts of August 7, 1934. (Exhibits 19 and 20.) The Court will recall the provisions of these instruments which indicate the purpose of R. F. C. to retain the old securities so long as necessary to maintain parity between its rights and the rights of non-accepting bondholders.

The Congress has specifically defined the position of R. F. C. as a creditor in Section 82 of the Act, which reads in part:

> "Sec. 82. The following terms as used in this chapter, unless a different meaning is plainly required by the context, shall be construed as follows: . . .
>
> "The term 'creditor' means the holder of a security or securities.

"Any agency of the United States holding securities acquired pursuant to contract with any petitioner under this chapter shall be deemed a creditor in the amount of the full face value thereof. * * *"

R. F. C. is an agency of the United States and holds securities which it acquired pursuant to contract with appellee.

Appellants claim that the plan was fully effected as to R. F. C. when the first bankruptcy petition under Section 80 was filed. It is true that R. F. C. accepted the first plan. That plan was necessarily and obviously *conditional* in its nature.

Section 80 (e) expressly provided in part:

"Before a plan is confirmed, changes and modifications may be made therein, with the approval of the judge after hearing upon notice to creditors, *subject to the right of any creditor who shall previously have accepted the plan to withdraw his acceptance,* within a period to be fixed by the judge and after such notice as the judge may direct, if, in the opinion of the judge, the change or modification will be materially adverse to the interest of such creditor, and if any creditor having such right of withdrawal shall not withdraw within such period, he shall be deemed to have accepted the plan as changed or modified: Provided, however, that the plan as changed or modified shall comply with all the provisions of this subdivision."

It is plain that the proceeding under Section 80 never reached the point of entry of a decree approving the plan. The proceeding was terminated without such approval and the plan and its conditional acceptance by R. F. C. were dead.

The same principles apply to the acceptance by R. F. C. of the plan in the state court proceeding under the Irrigation District Refinancing Act. Section 9 of that Act provides in part:

> "All changes, amendments or modifications shall be subject to the right of any creditor who shall previously have accepted the plan to withdraw his acceptance within a period to be fixed by the court and after such notice as the court may direct, if in the opinion of the court, the amendment, change or modification will be materially adverse to the interest of such creditor."

Thus the acceptance of the plan in the trial court was *conditional* upon the plan being approved by the Court unchanged. As in the proceeding under section 80, this point was never reached.

Counsel urge a strained interpretation of Section 19 of the State Act, which reads in part:

> "Sec. 19. CONSENT OF ACCEPTING BOND OR WARRANT HOLDERS NOT AFFECTED BY INVALIDITY OF ANY PORTION OF THIS ACT OR DISMISSAL OF PETITION. In the event that said petition for liquidation, refinancing or readjustment is dismissed, or that any of the provisions hereof for confirmation of the plan

> or acquisition of the bonds or warrants of the non-accepting holders shall be declared invalid, such dismissal or declaraion shall not affect the effectiveness of the plan with respect to the district or holders of bonds or warrants accepting the same."

Appellants urge that the words "dismissed" and "dismissal" apply to the voluntary dismissal made on motion of the petitioner and that the R. F. C. is therefore still bound by the plan. That this is not the true interpretation of the section appears from two considerations. In Section 19, the fact of dismissal is carried as a correlative to the fact of partial invalidity of the Act. Either of these facts would result in a judicial *prevention* of the district from having the full relief accorded by the Act. Also, a careful reading of the entire Act shows that the only kind of dismissal mentioned in the Act is that referred to in Section 8, in which, after setting forth the findings which the Court must make in order to enter an interlocutory judgment confirming the plan, it is stated:

> "If not so satisfied as above provided, the court shall enter a judgment dismissing the proceeding."

This kind of dismissal, that is, an *involuntary* dismissal based on the insufficiency of petitioner's proof, is what is intended and referred to in Section 19. And there is nothing in Section 19 which inhibits the district and the majority of its creditors from abandoning the plan in question and agreeing upon a new and different plan. Such new agreement is what actually took place in the present

case. At least one provision of the former plan was substantially *altered* when the plan of composition involved in the case at bar was drafted. The plan under Section 80 [Tr. pp. 332, 333] provided only for the offer of refunding bonds of the district at 24.81 cents per dollar in exchange for old securities. The plan under the State Act was identical in this respect. The plan of composition in the present case, however [Tr. pp. 120, 121], offers in exchange for the old bonds *"cash,* or, at the district's option, the bonds of this district of the 'Third Issue of Bonds (Refunding)' " at 24.81 cents per dollar.

The Court can readily see that an offer of *cash* instead of 4% bonds might be much different and more acceptable to certain bondholders than an offer of refunding bonds alone. The present plan of composition is therefore, in an important feature, a new and different plan.

Before closing the argument on this proposition we cannot refrain from expressing our surprise at the insult offered to this Court at page 88 of appellant's opening brief, which reads:

> "This question of the position of the R. F. C. is one of the most important in this appeal.
>
> "If ordinary rules of judicial interpretation are to be applied there can be no question of the outcome.
>
> "If the *result* of such interpretation is first to be scrutinized, to ascertain whether thereby Chapter IX and the general pogrom against the public creditor class is to be fully carried out, the appellants are perhaps lost anyway." (Emphasis appellants'.)

Comment is unnecessary.

Sixth Proposition: "The Claims Are Not All of the Same Class."

This proposition was not argued in the trial court.

The appellants state, without serious argument, five items which they consider invalidate the Court's finding that all of the securities are of one class. We comment with like brevity on each. We first ask, however, that the Court note, as illuminating this entire proposition, the provision of Section 83 (b):

> "That the holders of all claims, regardless of the manner in which they are evidenced, which are payable without preference out of funds derived from the same source or sources shall be of one class."

(1) Appellants assert that since R. F. C. is not the owner of the bonds it holds, it is in a separate class. As hereinbefore shown, the trial court held, upon substantial evidence, that R. F. C. is the owner of its bonds and this finding has not been successfully assailed.

(2) Appellants assert that some of them hold judgments against the district and others. As will be more fully shown under the Tenth Proposition herein, none of the appellants hold final judgments. If they did, they would not be in a separate class from other creditors.

> *Valette v. City of Vero Beach* (C. C. A. 5), 104 Fed. (2d) 59, decided May 22, 1939.

(3) Appellants assert that the "holders" of the alternative writ of mandate are in a separate class. This will also be discussed more fully under the Tenth Proposition. The contrary was held in *Valette v. City of Vero Beach, supra.*

(4) It is asserted that each bond and coupon "may be" in a separate class, which is practically the height of the ridiculous. A distinction is also sought to be made that

the holders of matured bonds and coupons are in a different class "because they are primarily the beneficiaries of the trust funds and properties." Yet if there is in the Palo Verde Irrigation District Act any trust in the sense referred to, that trust is for *all* the purposes of the Act and for the payment of *all* the indebtedness, not merely that which has been matured.

It is asserted that R. F. C. does not claim any matured coupons, or claim to have presented any matured bonds. We are satisfied, without making a precise calculation, that the bonds scheduled in the claim of R. F. C. [Tr. p. 48] include fully as large a proportion of matured bonds as the claims of appellants.

(5) Appellants claim that because the Drainage Act provides that the drainage bonds are a prior lien to any subsequent issue, these bonds are prior to some other subsequent bonds. The provision of the Drainage Act referred to [Sec. 30, Appendix to Op. Br. p. 23] clearly means that an issue of drainage bonds has a "preferred lien" to the lien of any subsequent issue of *drainage bonds.* There was only one issue of drainage bonds.

If this point had been urged before the trial court the Court might, upon appellants' theory, have set apart the issue of drainage bonds as a separate class. However, appellants do not intimate how such classification, or the lack of it, is of any import. R. F. C. holds [Tr. p. 35] 98.29% of the entire drainage bond issue, and consented to the proceedings on behalf thereof. How appellants could be injured by the failure of the Court to classify drainage bonds as a separate class is mysterious.

It is therefore respectfully submitted that the finding that all of the indebtedness is of one class has not been successfully assailed.

Seventh Proposition: "The Plan of Composition Is Not Fair, Equitable, or for the Best Interests of Creditors, and It Is Discriminatory."

This proposition was not in any of its phases urged before the trial court.

As in the case of the Sixth Proposition, appellants now urge, without serious argument, sixteen points to which appellee answers as succinctly as possible.

(1) Appellants assert that the "value of the land within the Palo Verde District warrants a vastly more generous payment to the bondholders." They mention the assessed values of the land in 1927 and 1937, and a value placed on the land by the appraiser for the R. F. C. at $70 to $80 per acre. This begs the question. The essential question in this cause is not the value of the land in the district but *the ability of the land to pay.*

The bondholders had their opportunity under the lease and option of August 18, 1932, to take all the land. Under that agreement they had the burden of reselling the land and recolonizing it so that it would produce an income and have a value. They had the burden of seeing to it that the irrigation system was kept in operation, for without the irrigation system the land was worthless desert. It is not surprising that the bondholders chose to give up this lease, and take the cash and let the credit go.

When Mr. Walter D. Wagner, appraiser for the R. F. C., spoke of a land value of $70 to $80 per acre, he spoke of *clear* and *improved* land. He immediately thereafter testified [Tr. p. 295]:

> "The land in 1933 had no sale value whatever. The average cost of clearing brush, leveling the land for irrigation, ditching it, and putting it in a condition to

be farmed would run anywhere from $20 to $50 an acre, possibly some of it higher."

Witness C. B. Reynolds testified [Tr. p. 309]:

"Very little land has been cleared and leveled in the valley for less than $50 an acre and the average is closer, where it is well leveled, to $100 an acre."

In addition, the land was not clear. It was subject to a debt of over four million dollars, or about $100 per acre on the 30,000 odd acres which had been improved.

(2) Appellants argue that "No provision is made for future prosperity of the district." This is positively untrue. The Court's finding was made in part on the evidence of two eminently qualified expert witnesses. Prof. R. L. Adams, of the University of California, an agricultural economist of many years' experience, first visited Palo Verde Valley in 1908 or 1909, made an economic study thereof in 1931, again in 1933, and again in 1935. His opinion as to the amount of debt which the district could sustain was based upon a carefully prepared estimate as to the income and outgo of farmers in the district over a period of twenty to thirty years in the *future*, taking into account the experience of the past.

Likewise, Mr. Walter D. Wagner, appraiser for the R. F. C., a man generally familiar with all of the irrigation districts in California, and who has made actual appraisals of 75 irrigation districts in California, Arizona, Nevada, Oregon, Washington and Idaho, and investigations of 30 to 40 additional districts; who has repeatedly visited the appellee district and who made the appraisement upon which R. F. C. acted in disbursing its million dollars, testified, on the basis of past crop production and prices, as to

the ability of the land to pay over a 30-year period in the *future*. Further, five farmer-witnesses, basing their testimony on actual experience in farming in the district for from 15 to 30 years, testified as to the maximum costs which the farmers could in the future bear.

(3) Appellants urge that the State, as owner of 99.66% of the land, will be unjustly enriched by the decree. The absurdity of this point is apparent when it is recalled that over half of the land in the district has been resold to former owners and others at nominal prices [which were the most that could be obtained, Tr. p. 309], and that the district holds the tax titles as well as the State. It will also be recalled that the Board of Supervisors of the County of Riverside, in assenting to the district's rehabilitation plans and selling the State tax title to the district for one-half of 1% of the assessed valuation, in effect cancelled approximately three-quarters of a million dollars of its delinquent taxes on the valley, for a consideration of about $10,000.00. [Tr. p. 290.]

(4) It is urged that "It is unfair, if not unconstitutional, to take the property of the bondholder who is a creditor of a public corporation, so to speak, and give it to enrich the landowner who is a stockholder of the corporation, so to speak." This is pure rhetoric, which has no recognizable relation to the facts. The landowners have not been enriched. The land has been taken away from them by tax deed. Some of them have repurchased their land and have started to pay for it again. They are starting over from the grass roots. It must not be forgotten that in reality *the bondholders lost their money when the floods and other economic disasters befell the valley.* At the time the plan of refinancing through R. F. C. was

announced, their bonds were worth 2¢ on the dollar; they had lost the 98¢. The willingness of R. F. C. and the energetic efforts of the district to refinance have made appellants' bonds worth 24.81 cents per dollar. The Court, by its decree, has *not* taken anything from the appellants which they had not theretofore in reality lost.

(5) Appellants, re-stating their second point above, urge that the bondholders should not be restricted to what R. F. C. "is willing to loan during a panic". As has been plainly shown, not only the decision of R. F. C. but the evidence of the witnesses in the case at bar, was based upon a prospective view of the earning power and ability to pay of the farmers of the district. As clearly stated by witness Wagner [Tr. p. 288], "He did not take as the ability of the land to pay what he (it) had been able to pay the last few years, for if he had done so there would have been absolutely no loan value, because the farmers had not made sufficient money even to pay the ordinary operating expenses of the district, let alone anything for bond service. Appraisal was made on the basis of assumed normal prices for crops, and the witness stated that it was assumed in making the loan and the appraisal that prices would get better and farmers would be able to sell their crops at a profit."

(6) Appellants cite Cal. Stats. 1917, page 243, as making it unlawful for the district to issue refunding bonds which would exceed 60% of the value of the bare land, plus the works of the district. A careful examination of the Statute in question discloses no such provision.

(7) Appellants criticise the 33 year period of the proposed R. F. C. loan, saying that the bonds could and should have been issued for 50 years. Sec. 57 of the Palo Verde Irrigation District Act says in part: ". . . no refunding bonds shall have a later date of maturity than forty years from the date of their issuance." Witness Wagner, speaking of the 33 year period generally adopted by R. F. C. stated [Tr. p. 289]: "This is a reasonable period to adopt in refinancing an agricultural district such as this." It is believed to be sound financing not to burden more than one generation with the cost of public works.

(8) It is argued that R. F. C. has received 4% interest, "but these respondents (appellants) are denied the same consideration."

Appellants could have cashed their bonds on October 31, 1934, or on any day since that date. They have voluntarily denied themselves income on the value of their bonds from that date on, for the obvious purpose of trying to mulct the district of a greater sum than 96.76% of the bondholders have accepted. It should be recalled that in three successive trials, the judges have concluded that this amount represented the maximum ability of the district to pay and was fair, equitable and for the best interest of the creditors. Appellants seek by this litigation to grasp more than is fair and equitable. In so doing they have let the interest slip through their fingers. A court of equity will hardly sympathize with them.

(9) Appellants now complain that R. F. C. will receive 4% bonds, but appellants must take cash. The Court

may judge of the sincerity of this claim of discrimination, when appellants throughout the first two proceedings persistently refused to accept 4% bonds.

(10) It is argued that R. F. C. will receive 100 cents on the dollar it loaned, whereas appellants take 24.81 cents. This claim is confused. R. F. C. purchased the bonds it holds at an average price of 24.81 cents per dollar. What appellants *paid* when they bought their bonds, the record does not disclose. None of the appellants has ever submitted himself as a witness in any of the three proceedings, and it has been impossible for the district to cross-examine them on this subject. If the point has any equitable bearing on the case, while it may possibly be that some of the appellants were original investors who paid par for their bonds, appellee does not accept appellants' implication that this is generally true. Appellee is prepared, if occasion arises, to offer evidence that a substantial number of appellants' bonds was purchased by them during the period while the market value of the bonds was dropping from 12 to 2. However this may be, the fact that R. F. C. receives bonds for the exact amount it invested, without profit, has no particular significance.

The plan *might* have been based on what each bondholder paid for his bonds, instead of on face value. If it had been, Exhibit 4 [Appendix hereto, p. 1] shows that nearly $400,000.00 of the bonds were sold at less than 15.

(11) Appellants cite the fact that the holders of the Mutual Water Company bonds received 50 cents per dol-

lar. As the record shows, this came about through an agreement between the Mutual Water Company bondholders and the holders of over 90% of the district bonds [Tr. p. 223], by which the latter consented to a deduction from their money, so that they actually received a net of 23.248¢ per dollar. Appellants are not concerned. The plan does not ask them to contribute, but allows them the full 24.81 cents.

Beyond this, it must be recognized that the Mutual Water Company bondholders had a remedy which the District bondholders did not have. They had the power to foreclose their deed of trust on the irrigation system, buy it in, go into the water business and make what salvage they could. The district bondholders could not do this. Their sole legal remedy was to insist that writs of mandamus to levy taxes be granted. This remedy, under the circumstances, was futile.

(12) It is urged that $100,000 in cash is held by the district as a trust fund earmarked by an alternative writ of mandate and belongs to appellants.

The alternative writ of mandate in question [Tr. pp. 304 to 306] earmarks nothing. No specific funds are referred to in it. No proof has ever been made that $100,000, or any other definite sum is in the hands of the district and subject to this writ.

In *Valette v. City of Vero Beach* (C. C. A. 5), 104 Fed. (2d) 59, certain of the creditors had obtained judg-

ments on their bonds and *mandamus absolute* for the levy of taxes to pay them. The Court holds at page 63:

> "There is no statute giving any lien or preference because of a grant of a mandamus. On its face the mandamus is a mere court order to an officer to do his duty."

Under this point appellants say that trust properties, being all the assets of the district, are taken from appellants. Appellants never had these properties and they are not taken from them. The properties are held in trust, under recent decisions of the Supreme Court of California (*Provident Land Corp. v. Zumwalt,* 96 Cal. Dec. 497; *Clough v. Compton-Delevan Irr. Dist.,* 96 Cal. Dec. 509), "for all the purposes of the Act," not merely for the purpose of paying the bondholders or a particular 1.88% of the bondholders. The Court in the *Provident* case says, for example, at page 503:

> "We do not mean to hold, nor is it contended by plaintiff, that the entire proceeds are held in trust for bondholders. Payment of the bonds is but one of the purposes of the trust."

It is further noteworthy that in the *Provident* case, the Court recognized that the continued operation and maintenance of the district was the primary purpose of the trust and that funds necessary for that purpose could be so used, the "surplus, over and above operating expenses," going to the bondholders.

The final observation on this point made by appellants is that no trustee can take trust property into bankruptcy.

Whether this is true as to ordinary bankruptcy proceedings, is of no import. The Congress has expressly provided, and the Supreme Court has held it constitutional, that such a district as appellee, trustee or not, may have relief under Sec. 83.

(13) Appellants here refer to the liability of the County of Riverside, the Drainage District and the Levee District, which they more fully argue under the Eleventh Proposition, and which will be discussed in our reply to that proposition.

(14) Appellants complain that it is unfair to scale down their claims when other bond issues of the County and the City of Blythe are not similarly scaled down. As above shown, the County has scaled down its delinquent taxes held against the district from $725,000 to $10,000. [Tr. p. 290.] To that extent the district has been relieved of contributing to the County bond issues. If County bonds have been paid 100%, it has been with tax money derived from other sections of the County than the Palo Verde Valley. The City of Blythe bonds were scaled down to less than 50 cents per dollar. [Tr. p. 193.]

Appellee is not given authority by Secs. 81 to 84 of the Bankruptcy Act to initiate a proceeding for the composition of bonds of the County and the City of Blythe. It is given authority to file a petition in respect of the bonds which it has issued and assumed and no others. Appellants' contention would nullify Secs. 81 to 84 in any district where there are overlapping bond issues of various public entities, unless all of the entities, at the same time,

obtained relief under the statute in the same degree. This cannot be the meaning of the act; it does not so require.

(15) Appellants complain that the district retains its water rights and irrigation system, and that the plan does not contemplate taking into account the value of these properties.

This Court will realize that an irrigation system, no matter what it costs, has no value separate from the value of the lands irrigated. It has no ability to produce income other than that of the land to be irrigated. In the arid west, land for which water is available has one value, dry land another. It is thus clear that when the witnesses evaluated the ability of the land to pay and considered it as irrigated land, they took into account the existence of the irrigation system and water rights.

(16) Finally, the contention is made that the right of levee bondholders to assessment against personal property as well as real property was not considered.

Appellants do not show, nor does the record, that the assessed value of personal property in the district is of more than nominal importance. If appellants had considered it as significant they could have offered evidence on the subject. The situation is identical with one point in *Valette v. City of Vero Beach, supra,* in which the Court held at page 62:

> "We think the objectors should have offered the evidence if they considered it important. They suggested the issue. The judge did not refuse to hear evidence; they omitted to offer it."

Eighth Proposition: "The Plan of Composition Is Not Presented in Good Faith."

This proposition was not urged in the trial court.

Appellants present, again without substantial argument, six points in which they urge that the finding of the trial court that the plan was presented in good faith is erroneous. The trial court's finding on this subject must be sustained if it was supported by any substantial evidence. The transcript shows abundantly the history of the efforts on the part of the district and the farmers to ascertain what their ability to pay amounted to, and to get advice and help as to what measures might be adopted to bring order out of chaos, and permit the community to survive. They went to the most authoritative official sources which could be found—the State University, State Engineer, Commissioner of the Bureau of Reclamation, the Secretary of the Interior, Committees of Congress, and finally, to a great and responsible governmental agency, the Reconstruction Finance Corporation. Each of these authorities recognized and found the absolute necessity of readjustment of the indebtedness of the district, if it were not be be forced to suspend operations and to permit the lands of the district to revert to desert. In the face of these findings, as well as the opinions of the trial judges in the three refinancing proceedings, appellants show some hardihood in asserting that the plan is not presented in good faith.

True it is that the dealings of the district and its officials with the bondholders must be fair and honest. True it is that it is the duty of the trial court to investigate the circumstances with care, in order to do even-handed justice between the district and the bondholders.

Absolutely untrue is it, as appellants boldly charge, that there was in fact no careful investigation by the district judge.

It is true that appellants were given no funds with which to make an investigation. The holders of over 87% of the bonds had made their own investigation, at their own expense, with their own engineer. [Tr. p. 195.] Appellants never at any time asked the Court for an allowance of funds for another such investigation for the protection of their 1.88%.

It is not true that there was no one to defend or protect their interests. Counsel in the case at bar, who were counsel in the State refinancing case and in the first proceeding in bankruptcy, who were counsel for bondholders in *U. S. v. Bekins,* 304 U. S. 27, and who appear as counsel for bondholders in a dozen or more irrigation district composition cases, appeared to defend and protect the interests of appellants.

Appellants say that the hearing in the trial court lasted approximately an hour and consisted of a deposit in court of the transcript of the hearing in the State Court.

In view of the fact that the merits of the plan had been the subject of two previous thorough trials, one in the bankruptcy case, and the other in the State Court, which cases present counsel for both sides tried, it was stipulated, to save another week's trial of the same evidence [Tr. p. 46], that the transcript in the State Court might be offered in the present case and "received in evidence with the same effect as if such witnesses had testified in said District Court as their testimony appears in said transcript . . ." It was further stipulated that *no material change* in the conditions relating to the merits of the plan

had occurred since the hearing in the State Court. But this was not all. It was further stipulated that the merits of the plan should be submitted for decision

> "upon said transcript of oral evidence and stipulations, such *additional evidence* as the parties may desire to adduce, such objections, exceptions *and contentions* as the parties may desire to present and upon this stipulation."

It cannot be gainsaid, thus, that appellants had a full and free opportunity to introduce before the District Court any evidence that they chose and to make any contentions that they chose.

The case being an adversary proceeding, what kind of investigation by the Court appellants now demand is difficult to understand. The Court was hardly under any duty to look for evidence which learned and thoroughly experienced counsel did not choose to present.

> *Valette v. City of Vero Beach* (C. C. A. 5), 104 Fed. (2d) 59, 62.

Coming now to the specific points urged by appellants:

(1) They urge that the district presented the facts in a "bitterly partisan spirit showing the utmost hostility to the objectors."

Appellee challenges this statement. There is not a bit of evidence in the record that supports it.

(2) Appellants cite "A long list of harassments of these appellants, . . ." consisting of the proceedings in the three refinancing cases. The shoe is on the other foot. The district has, perforce, not willingly, prosecuted three proceedings, the first of which was commenced March 29,

1935. The bondholders have harassed the district with fourteen suits on bonds or for mandamus. [Tr. pp. 105 to 108.] The court records show that the first group of these cases was commenced June 20, 1934.

(3) Appellants call the execution of Exhibit 20 "connivance" with R. F. C. This agreement was approved by official acts for a lawful purpose. The acts were not only those of the district trustees, as public officers, but of an important and responsible agency of the United States. There was nothing wrong or immoral about the agreement. It meant that R. F. C. was willing to relieve the district, but not in such a way or at such a time as to give an opening for bond speculators to buy bonds of the district at 2 and collect them at 100, plus five years' accrued interest. R. F. C. was not refinancing bondholders for more than their bonds were worth. That the agreement is not palatable to appellants in no way excuses their charge that it was not made in good faith.

(4) As a shotgun charge appellants cite the failure of the county and district officers to meet appellants' obligations according to law. If this refers to their failure to levy taxes, the history of the delinquencies and tax-deeding experience of the district shows conclusively that the levying of more taxes than were levied would not have benefited the appellants. All the land was tax-deeded anyway. The taxes were only a lien on the land and not a personal obligation. If the district had levied ten times as much in taxes the result would have been unchanged.

(5) Appellants charge the district with assisting R. F. C. to acquire the bonds to "buy its way into Court." R. F. C. did not purchase its bonds as a part of a speculation, by which to make a profit through these composition pro-

ceedings. The bulk of the bonds was purchased by R. F. C. October 31, 1934. Secs. 81 to 84 were not enacted until August 16, 1937. The purchase of the bonds was made in no sense for the purpose of speculating upon the misfortunes of the district or non-assenting bondholders, but as a step in a process which the district still hopes will ultimately be completed and which is in the ordinary course of the business of the R. F. C.

(6) Appellants complain at the furnishing of money by the district to pay the expenses of the Security Bank escrow. $950.00 (not $1,450) was so paid. This amount was less than 1/10th of 1% of the amount which was disbursed by R. F. C. in purchasing the old securities. It was not a contribution to the purchase price. How the payment resulted unfairly to appellants, or indicates bad faith on the part of the district is not made clear. Appellants claim that the payment was *ultra vires,* which, of course, under authorities heretofore cited, only the State can assert. But the district has in addition to its specific powers very broad general powers. For example:

> "Sec. 9—Powers and Duties of the District. The District shall have power:
>
> * * * * * * * *
>
> (5) To do and perform all other things necessary, incident or proper to carry into effect the purposes for which this district is created, and as provided by this act."

The charges of bad faith presented by appellants are thus seen to be weak and inconclusive, in the extreme.

Ninth Proposition: "The State as a Debtor Cannot Repudiate Its Obligations in These Proceedings."

This point was not among those urged in the trial court.

Appellants on this point contend that "the State is now in actual fact the owner" of 99.66% of the land in the district. This thought is expressed in some rather hyperbolic language in *El Camino Irr. Dist. v. El Camino Land Corp.*, 96 Cal. Dec. 505, 508. The language is used *arguendo*. It is not accurate to push the theory that the district is an agency of the State to the extremity that the agent and principal are the same. An irrigation district does not have all the powers and immunities of the State nor is it subject to all the limitations and obligations of the State. In *People v. Jefferds,* 126 Cal. 296, the Court holds, at page 301:

> "It is urged that Brown's Valley Irrigation District is a quasi public corporation, and, representing as it does the interests of the people of the state, that laches cannot be imputed to the corporation. * * * It is a rule that statutes are construed as not including the sovereign except the construction is compelled by express terms or by necessary implication; as, for example, statutes of limitations; but it was held in *Estate of Royer,* 123 Cal. 614, that the University of California, though a public corporation and a state instrumentality, is not clothed with the sovereignty of the state, but is included in the statute (Civ. Code, sec. 1313), which limits the amount of any bequest in its nature charitable. *We*

do not think an irrigation district, formed under the statutes of the state, is clothed with the sovereignty of the state or is the sovereign."

Appellants assert (Op. Br. p. 100) that the State is "seeking by these proceedings *to destroy* a public trust . . ." This is not so. The district, rather than the State, is seeking by these proceedings to perpetuate the trust. It is evident that unless the refinancing can be completed the main purpose of the trust, which is the providing of homes and farms, and the continued cultivation of the irrigable lands of the district, cannot continue to be carried out.

The contention that the State is seeking to submit its obligations to the jurisdiction of the Bankruptcy Court is farfetched. The decision in *U. S. v. Bekins,* 304 U. S. 27, expressly rules that the district, although an agency of the State, may have the benefits of Secs. 81 to 84 of the Bankruptcy Act. Present counsel for appellants did in their briefs and arguments in the *Bekins* case urge this same contention upon the Supreme Court and it was not accepted.

Tenth Proposition: "The Decree Unlawfully Takes Trust Funds and Vested Rights Belonging to Respondents." (Appellants)

This point was not argued in the trial court.

It may be first observed that there is no sanctity in "vested rights" in a court of bankruptcy. That court terminates "vested rights" in every case that comes before it.

Appellants argue *in extenso* under this proposition three points:

(1) It is true that appellants Jordan and First National Bank of Tustin each had in the Superior Court certain judgments against the Drainage District and Levee District. Appeals were taken from each of these judgments and are undetermined. Thus, none of these judgments are final or enforcible. Until they are final they bind nobody and establish no vested rights, additional to the rights of these bondholders as general creditors.

In the decision in *Valette v. City of Vero Beach* (C. C. A. 5), 104 Fed. (2d) 59, which was decided May 22, 1939, it appeared that three of the creditors had, before the filing of the petition under Sec. 83, obtained final judgments on their bonds. They contended that they were in a separate class. The trial court found that all the debts were "payable without preference out of funds derived from the same source, to-wit: *ad valorem* taxes, and no specific property or revenue is pledged to the payment of said bonds or any of them." This is substantially

the language used in the second paragraph of Sec. 83 (b). The trial court held accordingly that all the bonds, regardless of judgments, were in one class. The Circuit Court of Appeals affirmed the decision, holding (at p. 62) that the term "pledge" as used in Sec. 83 (b) "refers to a contractual arrangement, rather than to some advantage or lien obtained through legal proceedings."

The Court found that under Florida law a judgment against a municipality gives the creditor no specific lien.

Appellants also say that their judgments, which are inchoate and not final, "are judgments against *other debtors* than the bankrupt." (Emphasis appellants'.)

The "other debtors", meaning the old Drainage and Levee Districts, are defunct. They have been merged into the person of the irrigation district, and have now no existence separate from it. This is, of course, one of the grounds of the appeals from the Superior Court judgments, as was also the fact that the summonses in these cases were served upon one who never was an officer or employee of either the Drainage District or the Levee District.

(2) Appellants next contend that they had vested rights in the writ of mandate obtained from the Superior Court "earmarking certain funds as trust properties belonging to them."

This Court will note that no right of appellants whatever has been *determined* by the Superior Court in the mandate case referred to. The only writ involved was an alternative writ, which was a preliminary process by

which the Court obtained jurisdiction over the district, but which by its terms decided nothing. And if there had been a determination and a peremptory writ of mandate had been issued, the decision of the Fifth Circuit Court of Appeals in the *City of Vero Beach* case, *supra,* at page 63 of the opinion aptly applies:

> "There is no statute giving any lien or preference because of a grant of a mandamus. On its face the mandamus is a mere court order to an officer to do his duty."

(3) Appellants argue that the bondholders are entitled to payment in the order of the presentation of their bonds for payment and that all of the funds of the district are trust property belonging, first to the holders of matured bonds, and second to the holders of unmatured bonds. Counsel cite decisions which do not support their theory.

Clough v. Compton-Delevan Irrigation District, 96 Cal. Dec. 509, at page 511, expressly states that the trust in question "is for all the purposes of the act. Payment of the bondholders is such a purpose, * * *" So much of the *Clough* decision is quoted by appellants (Op. Br. p. 107). As the Court will see, appellants quote but part of the second sentence; the entire sentence reads:

> "Payment of the bondholders is such a purpose, as we have held in the Provident Land Corporation case, supra; but there are other purposes as well, and the bondholders cannot be *considered exclusive beneficiaries, even if the doubtful assumption be made that they, as individuals, are beneficiaries at all."*

The Court continues:

> "Indeed, it is futile to attempt to discover the 'beneficiaries' of the statutory trust created by Section 29."

In *Provident Land Corporation v. Zumwalt,* 96 Cal. Dec. 497, at page 503, the Court holds:

> "We do not mean to hold, nor is it contended by plaintiff, that the entire proceeds are held in trust for bondholders. Payment of the bonds is but one of the purposes of the trust."

It may be noted that present counsel for both sides herein appeared *amicus curiae* in the *Clough* case.

There is no provision of the Palo Verde Irrigation District Act which gives the holder of a bond which has been presented for payment any preference or priority over any other bondholder. There is such a provision in Sec. 52 of the California Irrigation District Act, which authorizes registration of unpaid matured bonds. Such registration has been held to entitle the holder of the bonds to payment in the order of presentation.

Bates v. McHenry, 123 Cal. App. 81;
Selby v. Oakdale Irr. Dist., 140 Cal. App. 171;
Shouse v. Quinley, 3 Cal. (2d) 357.

These decisions, of course, do not apply to the Palo Verde District.

Appellants (Op. Br. pp. 106 to 108) quote certain general language from the *Provident* case, concluding with a statement that the land can never be permanently released from the obligation of the bonds until they are paid.

The Supreme Court of California, in saying this, obviously did not have in mind the operation of Secs. 81 to 84 of the Bankruptcy Act, but was speaking solely in the light of the provisions of the California Irrigation District Act.

It is respectfully submitted that the decree does not unlawfully take anything from appellants.

Eleventh Proposition: "The Liability of the Levee District, and of the Drainage District, and of the County of Riverside Was Not Taken Into Consideration by the Court."

This point was not urged upon the trial court.

Appellants review the provisions of the Levee District Act and the Drainage District Act, which provide for the levying of taxes to pay the bonds issued by these entities. Neither of these entities is a juridical person which can now be brought before a court. Both of them were merged into the person of the irrigation district by the terms of Sections 12 and 13 of the Palo Verde Irrigation District Act. The irrigation district assumed all their duties, functions and obligations. As heretofore stated, the irrigation district includes all territory which was in either of the defunct districts. There were only trifling strips which were in the levee district and not in the drainage district, or *vice versa*. The taxable property in question was substantially the same as that of the irrigation district. The irrigation district was substituted for them, with full and adequate powers to levy taxes and to pay the levee and drainage bonds. Under this substitution no harm was done to bondholders. As was held in *Moody v. Provident Irrigation District*, 96 Cal. Dec. 512, at p. 514:

> "Likewise, it is also well settled that the law in force at the time the bonds and coupons are issued by a district becomes a part of the contract. (*Hershey v. Cole,* 130 Cal. App. 683, 20 Pac. (2d) 972, and cases there cited.) These cases, however, do not

> limit the power of the legislature to provide for a subsequent method of payment *which does not impair* the existing rights of the bondholder; * * *."

Here we note again the provision of Section 83(b) which reads:

> "That the holders of all claims, *regardless of the manner in which they are evidenced,* which are payable without preference out of funds *derived from the same source or sources* shall be of one class."

Viewing the trifling discrepancies of the boundaries of the three districts, as *de minimis,* the *source* of payment of all the bonds is the same, to-wit, the taxable property of the valley. The bonds are all of one class and no difference in price is called for.

Appellants state (with emphasis) that the levee district is not a party to these proceedings. It could not be a party, except as it is a party as represented by its statutory successor, the irrigation district. Considering that all of the assets and liabilities, and ability to pay, of the irrigation district, including those belonging to the old levee and drainage districts, were fully laid before the trial court for its consideration, it is difficult to see, and appellants do not point out, what harm has come to them by the Court's disregarding the former separate entities of the levee and drainage districts, now some 16 years defunct.

Appellants vaguely hint at some responsibility of the County of Riverside in the premises. What money liability the county is under cannot be made out.

Twelfth Proposition: "The District Is Not Authorized by Law to Carry Out the Plan."

This is not one of the points presented to the trial court.

In this proposition appellants state, but do not argue, six points which will be hereinafter quoted, together with the answers to them.

(1) "The state has not consented."

Answer: It has, as will be fully shown under the Thirteenth Proposition, which is to the same effect.

(2) "The District's Securities Commission has not approved the plan adopted May 10, 1938."

Answer: The Commission is not required by Sections 81 to 84, inclusive, to approve any plan. It was so required by Section 80 of the old act.

(3) "The authority of the R. F. C. to loan further expired in 1936."

Answer: Appellants do not indicate, and we have not found, any statute which so provides.

(4) "The people voted on a plan in June, 1934, which is fully executed."

Answer: The refinancing bonds which were voted on have never been issued.

(5) "The R. F. C. resolution of 1934 contains provisions which the district cannot perform, *e. g.*, a promise not to issue other bonds."

Answer: Section 10, Subdivision 2, of the Palo Verde Irrigation District Act gives the district board the general power, without limitation, to "make and execute all necessary contracts * * *".

(6) "The plan of composition of May 10, 1938, is not shown to be authorized by the board of trustees."

Answer: A certified copy of the resolution adopted by the board of trustees authorizing the commencement of these proceedings and concluding with an express approval of the plan of composition was offered and received in evidence as Petitioner's Exhibit 2. [Tr. pp. 36 to 39.] This resolution is attached to the petition as Exhibit "E", and is not denied by appellants' answer.

Thirteenth Proposition: "The State Has Not Given Its Consent."

This proposition was not argued before the trial court.

Appellants argue that Chapter 4 of the California Statutes of 1934 (Extra Session), in which the state expressly gave its consent to bankruptcy proceedings on the part of its taxing districts, violates Article I, Section 16, of the State Constitution, prohibiting the state from impairing contracts, unlawfully delegates judicial power, in violation of Article VI, Section 1 of the State Constitution, and the Tenth Amendment of the Federal Constitution, and amounts to an attempted surrender of the power of taxation, in violation of Article XIII, Section 6, of the State Constitution; also attempts to take private property for the payment of public debt, in violation of Article XI, Section 15, of the State Constitution.

Appellants claim that they are entitled to reopen this question because the Chief Justice in the *Bekins* case remarked in this connection:

> "We have not been referred to any decision to the contrary."

This Court should have before it the full and illuminating discussion of the point as written by the Chief Justice (304 U. S., commencing at page 47):

> "It is unnecessary to consider the question whether Chapter X would be valid as applied to the irrigation district in the absence of the consent of the state which created it, *for the state has given its consent.* We think that this sufficiently appears from the statute of California enacted in 1934. Laws of 1934, Ex. Sess., ch. 4. This statute (Section 1) adopts the definition of 'taxing districts' as described in an amendment of the Bankruptcy Act, to-wit, Chapter IX, approved May 24, 1934, and further provides that the Bankruptcy Act and 'acts amendatory and supplementary thereto, as the same may be amended from time to time, are herein referred to as the "Federal Bankruptcy Statute".' Chapter X of the Bankruptcy Act is an amendment and appears to be embraced within the state's definition. We have not been referred to any decision to the contrary. Section 3 of the state act then provides that any taxing district in the state is authorized to file the petition mentioned in the 'Federal Bankruptcy Statute'. Subsequent sections empower the taxing district upon the conditions stated to consummate a plan of readjustment in the event of its confirmation by the federal court. The statute concludes with a statement of the reasons for its passage, as follows:
>
> " 'There exist throughout the State of California economic conditions which make it impossible for property owners to pay their taxes and special assess-

ments levied upon real or taxable property. The burden of such taxes and special assessments is so onerous in amount that great delinquencies have occurred in the collection thereof and seriously affect the ability of taxing districts to obtain the revenue necessary to conduct governmental functions and to pay obligations represented by bonds. It is essential that financial relief, as set forth in this act, be immediately afforded to such taxing districts in order to avoid serious impairment of their taxing systems, with consequent crippling of the local governmental functions of the state. This act will aid in accomplishing this necessary result and should therefore go into effect immediately.'

"While the facts thus stated related to conditions in California, similar conditions existed in other parts of the country and it was this serious situation which led the Congress to enact Chapter IX and later Chapter X."

Again the Supreme Court says, at page 52:

"It is of the essence of sovereignty to be able to make contracts and give consents bearing upon the exertion of governmental power. This is constantly illustrated in treaties and conventions in the international field, by which governments yield their freedom of action in particular matters in order to gain the benefits which accrue from international accord. Oppenheim, International Law, 4th Ed., Vol. I, Pars. 493, 494; Hyde, International Law, Vol. II, Par. 489; Perry v. United States, 294 U. S. 330, 353; Steward Machine Company v. Davis, 301 U. S. 548, 597. The reservation to the states by the Tenth Amendment protected, and did not destroy, their right to make contracts and give consents where that action would not contravene the provisions of the Federal Constitution."

This statement disposes of the argument based on the Tenth Amendment and Article VI, Section 1 of the California Constitution. The Supreme Court says further, at page 52:

> "While the instrumentalities of the national government are immune from taxation by a state, the state may tax them if the national government consents (Baltimore National Bank v. State Tax Commission, 297 U. S. 209, 211, 212) and by a parity of reasoning the consent of the state could remove the obstacle to the taxation by the federal government of state agencies to which the consent applied."

This settles appellants' point as to Article XIII, Section 6, of the State Constitution.

Finally the Court holds, at pages 53, 54:

> "In the instant case we have cooperation to provide a remedy for a serious condition in which the states alone were unable to afford relief. Improvement districts, such as the petitioner, were in distress. Economic disaster had made it impossible for them to meet their obligations. As the owners of property within the boundaries of the district could not pay adequate assessments, the power of taxation was useless. The creditors of the district were helpless. The natural and reasonable remedy through composition of the debts of the district was not available under state law by reason of the restriction imposed by the Federal Constitution upon the impairment of contracts by state legislation. The bankruptcy power is competent to give relief to debtors in such a plight and if there is any obstacle to its exercise in the case of the districts organized under state law it lies in the right of the state to oppose federal interference. The state steps in to remove that obstacle. The state acts in aid, and not in derogation, of its sovereign powers. It invites the intervention of the bankruptcy

> power to save its agency which the state itself is powerless to rescue. Through its cooperation with the national government the needed relief is given. We see no ground for the conclusion that the Federal Constitution, in the interest of state sovereignty, has reduced both sovereigns to helplessness in such a case."

By implication this disposes of appellants' argument under Article I, Section 16, and Article XI, Section 15 of the State Constitution.

It seems impossible to conclude otherwise than that the Supreme Court held that the 1934 State Act consenting to bankruptcy proceedings was a sufficient and valid consent, if consent is requisite, for the proceedings under Sections 81 to 84 of the Bankruptcy Act. The Court expressly so held and this Court is bound by the decision.

Appellants refer to the fact that since the appeal was taken in this cause the 1934 State Act was repealed by California Statutes 1939, Chapter 72. The 1939 Act is brief and simple. For convenient reference it is printed in the appendix to this brief, at page 4. Section 1 authorizes any taxing agency or instrumentality of the state, as defined in Section 81, to prosecute all proceedings permitted by Sections 81 to 84. The state expressly consents to the adoption of Sections 81 to 84 and their application to its agencies and instrumentalities. Section 2 validates all proceedings heretofore filed under Sections 81 to 84 by any taxing agency or instrumentality. Section 3 repeals the 1934 Act, with a saving clause that such repeal shall not impair nor affect any existing proceedings under Sections 81 to 84. Section 4 is an urgency clause, under which the act went into immediate effect April 21, 1939.

It is respectfully submitted that under both the 1934 and 1939 State Acts above mentioned, the state has adequately, for all purposes, consented to the jurisdiction of the Federal Court in composition cases under Sections 81 to 84 of the Bankruptcy Act.

Fourteenth Proposition: "The Act Is Unconstitutional in That it Violates the Federal Constitution."

This point was not suggested to the trial court.

Appellants would now have this Court hold that Sections 81 to 84 are unconstitutional and in violation of the Fifth Amendment, the Tenth Amendment and Article I, Section 10, Clause 1, of the Federal Constitution. Of course, present counsel for appellants were counsel for the bondholders in the *Bekins* case, and argued and briefed these propositions exhaustively in the *Bekins* case. They now say that at the time of the decision in the *Bekins* case there was no "final and clear decision" by the California courts that the functions of California irrigation districts "were strictly governmental"; that the state courts have now rendered such decisions; and that, under the *Erie R. R. Co.* case, this Court should reexamine the constitutional questions so thoroughly argued in the *Bekins* case.

What counsel mean by "final and clear decision" by the state courts appellee cannot understand. No decision by any appellate court is so *final* as to prevent restatement,

amplification, qualification, or possibly even reversal by the same court.

The governmental nature of the functions of an irrigation district has been *clear* ever since the decision in *Turlock Irr. Dist. v. Williams,* 76 Cal. 360, in which the Supreme Court in 1888 held constitutional the original Wright Act of 1887. This decision was followed by *In re Madera Irr. Dist.,* 92 Cal. 296, 315, 321, and many other decisions, of which *Crawford v. Imperial Irr. Dist.,* 200 Cal. 318; *Morrison v. Smith Bros., Inc.,* 211 Cal. 36, and *Wood v. Imperial Irr. Dist.,* 216 Cal. 748, may be mentioned.

The Court in the *Morrison* case carefully distinguishes between governmental and proprietary character. It says, as to irrigation districts, at page 40:

> "In reference to this type of organization the law is well settled that, subject to certain exceptions not important in this case, they are not liable for the torts of their agents, upon the theory that they are state agencies, *performing a governmental function.* (*Whiteman v. Anderson-Cottonwood Irr. Dist.,* 60 Cal. App. 234, 236 (212 Pac. 706); *Nissen v. Cordua Irr. Dist.,* 204 Cal. 542 (269 Pac. 171).)"

In the light of these decisions there is nothing new to be brought to the attention of this Court or the Supreme Court under the doctrine of the *Erie R. R. Co.* case. Regardless of this, we call attention again to the fact that

the *Bekins* and *Erie* cases were decided by the Supreme Court on the same day and were under consideration at the same time, and that the petition for rehearing in the *Bekins* case filed by present counsel for appellants was denied nearly a month after the two cases were decided.

The circumstances referred to in the last paragraph of appellants' argument in the Fourteenth Proposition have all been disposed of hereinbefore, except the concluding clause, which intimates that the legislation benefits "private mortgages on property and increases the value of private property rights in lands and buildings within the district". Reference has already been made to the scaling down of delinquent taxes due the County of Riverside and the compromising of the bonds of the City of Blythe. In addition, it appears from the testimony of the principal financer of cotton crops in the valley [Tr. p. 183] that his company in 1935 voluntarily reduced its overdue loans in the valley by an average of 90%. In many cases the banks and insurance companies scaled mortgages and trust deeds down [Tr. p. 312], one witness testifying that such voluntary reductions had amounted to more than 75% [Tr. p. 320]. It thus appears that appellants' contention is theoretical, rather than actual.

C. CONCLUSION.

The Palo Verde Irrigation District is an isolated, desert farming community, nearly a hundred miles from any other community. It is not an important part of the taxable wealth or business activity of the Nation. But its plight typifies a grave and widespread National problem, which our government has earnestly striven to solve.

The district is not made up alone of farming lands, canals, implements and houses. Primarily, it is made up of pioneer American men and women who have made in this valley their homes. They have built their churches and schools, their social and civic organizations and have reared their children in this frontier spot.

They have been overwhelmed by successive physical and economic disasters. The weaker ones, or those with shallower roots, drifted away. But, as the record reflects, those who remained have worked hard, have eked along on a very low standard of living and have done their best, through economy in operation of their district, to cut their coat to fit their cloth.

In doing this, these people have exhausted, not only their material resources, but almost all the strength and courage they had. They have carried on, not only against the harshness of extreme desert heat and frontier hardships, but also against the almost certain prospect that they would lose their homes and that they and their children would become derelicts. As one witness grimly said [Tr. p. 322]: "These people have stayed in the valley because they had quite a bunch of guts and some hope."

This slim hope our government has sought to realize. It was to save just such broken communities and such homes and to keep such people self-supporting and self-

reliant, that the Congress of the United States, by Section 36 of the Emergency Farm Mortgage Act of 1933, authorized Reconstruction Finance Corporation to refinance irrigation, drainage and levee districts. It soon developed that, in almost every such district, a few bondholders were obstructing a refinancing by demanding their pound of flesh. (See Committee hearings, cited in Mr. Justice Cardozo's dissenting opinion in the *Ashton* case.)

The Congress has found a way out, so that its purpose should not be thwarted. It adopted Chapter IX, and later Chapter X, of the Bankruptcy Act. The Supreme Court, by its sweeping and conclusive decision in the *Bekins* case, held the latter Act constitutional. It was then thought that the great social purpose of the Congress could be made effective.

But a tiny residue of the bondholders has continued to fight a last-ditch battle to keep from being obliged to take that which has been abundantly demonstrated to be fair and equitable. In this, they stamp themselves as unfair and inequitable.

We cannot help but think that, in the consideration of this cause, this Court will devote its chief attention, not to the grammar and punctuation of the Statutes in question, but to the vital principles which the Congress has embodied in the Acts, in order to carry out its manifest social purpose, as recognized and expounded by the Supreme Court, and that this Court will affirm the decision in the Court below.

Respectfully submitted,

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ARVIN B. SHAW, JR.,
WM. L. MURPHEY,
Attorneys for Appellee.

APPENDIX.

Appellee's Exhibit 4.

Palo Verde Drainage District

Date	Amount	Price
12/11/30	$ 1,000.	12½F
3/31/32	5,000.	7½F
6/10/32	6,000.	4¾F
6/13/32	4,000.	4½F
8/19/32	3,000.	5½F
11/23/32	2,000.	2¾F
2/15/33	1,000.	2¼F
9/27/33	6,000.	5½F
10/9/33	5,000.	6¼F
10/11/33	5,000.	6F
10/31/33	10,000.	6F

Palo Verde Joint Levee District

Date	Amount	Price
2/20/31	$ 3,000.	14F
3/31/32	5,000.	8½F
6/10/32	4,000.	4¾F
6/13/32	8,000.	4½F
7/27/32	9,000.	8 F
10/25/32	23,000.	4 F
12/16/32	7,000.	3¼F
2/7/33	1,000.	2 F
2/20/33	7,000.	3½F
5/12/33	25,000.	4 F
5/18/33	25,000.	5½ F
2/23/34	4,000.	15 F

Palo Verde Irrigation District

Date	Amount	Price
9/12/31	$ 4,000.	10 F
5/4/32	5,000.	5 F
5/11/32	5,000.	4½F
6/10/32	6,000.	4¾F
6/13/32	4,000.	4½F
6/22/32	12,000.	4⅛F
8/18/32	8,000.	7 F
8/29/32	5,000.	6 F
9/1/32	5,000.	5 F
9/7/32	5,000.	7 F
9/22/32	5,000.	5 F
9/27/32	7,000.	4¼F
12/30/32	5,000.	2 F
1/10/33	10,000.	3⅜F
6/13/33	7,000.	5¼F
6/21/33	1,000.	5 F
7/15/33	5,000.	6 F
10/2/33	5,000.	6 F
10/11/33	5,000.	6 F
10/15/33	10,000.	7 F
12/1/33	15,000.	7 1/6 F
12/22/33	5,000.	7 F
12/28/33	5,000.	9½F
1/30/34	15,000.	14 F

Date	Amount	Price
2/20/34	1,000.	15 F
2/23/34	1,000.	16¼F
2/27/34	10,000.	15¼F
3/1/34	3,000.	15½F
3/1/34	5,000.	15 F
3/6/34	10,000.	15¼F
3/7/34	10,000.	16 F
3/15/34	12,000.	16 F
4/13/34	1,000.	15¼ F
5/10/34	1,000.	18½F
5/25/34	1,000.	18½F
6/5/34	5,000.	18 F
6/5/34	5,000.	17½ F
6/7/34	2,000.	18 F
10/29/34	5,000.	20½F
11/1/34	5,000.	21½F

From this time on there was no actual trade in the bonds as far as we know. This was due to the expected cash settlement of the bonds by the RFC and consequently the owners retained their holdings in anticipation of settlement.

CHAPTER 72.

An act authorizing taxing agencies and instrumentalities to prosecute proceedings under sections 81, 82, 83 and 84 of the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved July 1, 1898, as amended, consenting to the adoption of the sections by the Congress, validating proceedings under or in contemplation of proceedings under the sections, and repealing Chapter 4 of the Statutes of the Extra Session of 1934, and declaring the urgency hereof.

[Approved by Governor April 20, 1939. Filed with Secretary of State April 21, 1939.]

The people of the State of California do enact as follows:

SECTION 1. Any taxing agency or instrumentality of this State, as defined in section 81 of the act of the Congress of the United States entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved July 1, 1898, as amended, is hereby authorized to file the petition mentioned in section 83 of the act and to prosecute to completion all proceedings permitted by sections 81, 82, 83 and 84 of the act, as amended. The State of California hereby consents to the adoption of sections 81, 82, 83 and 84 by the Congress and consents to the application of sections 81, 82, 83 and 84 to the taxing agencies and instrumentalities of this State.

SEC. 2. Whenever any taxing agency or instrumentality of this State, as defined in section 81, has heretofore filed, or purported or attempted to file a petition under section 83 or has taken or attempted to take any other proceedings under, or in contemplation of pro-

ceedings under, sections 81, 82, 83 and 84, all acts and proceedings of such taxing agency or instrumentality and of the governing board or body and officers, attorneys and agents thereof, in connection with such petition or proceedings, are hereby legalized, ratified, confirmed and declared valid to all intents and purposes and the power of such taxing agency or instrumentality, governing board or body and officers, attorneys and agents to file such petition and take such proceedings is hereby ratified, confirmed and declared.

SEC. 3. The act of the Legislature of California entitled "An act in relation to relief from special assessments and in relation to financial relief therefrom, and of taxing districts, as defined in Chapter IX of the act of Congress entitled 'An act to establish a uniform system of bankruptcy throughout the United States,' approved July 1, 1898, as amended, validating petitions and proceedings under or in contemplation of proceedings under, said Chapter IX, and authorizing contribution by cities and counties toward the payment of such assessments, and declaring the urgency thereof, to take effect immediately," approved September 20, 1934, being Chapter 4 of the Statutes of the Extra Session of 1934, is hereby repealed, but the repeal of the act shall not impair nor affect any action or proceeding commenced under sections 81, 82, 83 and 84 while the act of the Legislature was in effect. Failure to comply with any of the requirements of Chapter 4 of the Statutes of the Extra Session of 1934 shall not impair nor invalidate any decree heretofore or hereafter rendered under the provisions of sections 81, 82, 83 and 84.

SEC. 4. This act is hereby declared to be an urgency measure within the meaning of section 1 of Article IV

of the Constitution, necessary for the immediate preservation of the public peace, health and safety and shall take effect immediately.

The facts constituting such necessity are as follows: Throughout the State of California economic conditions are such that in many localities it is impossible for property owners to pay taxes and special assessments levied upon real or personal property. The burden of such taxes and special assessments is so great that great delinquencies have occurred in collection thereof and a large number of special assessment districts, irrigation districts and other agencies and political subdivisions of the State have become delinquent upon bond issues and are under the necessity of making compositions with their bond creditors. This act is intended to afford means by which such agencies and political subdivisions may enforce proper compositions of such bonded and other indebtedness and it is essential that the relief herein provided be immediately afforded to such agencies and political subdivisions in order to avoid serious impairment of their taxing systems and consequent crippling of the local governmental functions of the State. This act should therefore go into effect immediately.